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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

Docket No. FAA-2006-25709; Amendment No. 93-87

RIN 2120-AI70

Congestion Management Rule for LaGuardia Airport

AGENCY: Federal Aviation Administration (FAA).

ACTION: Final rule.

SUMMARY: Today the FAA is publishing a final rule to address congestion at New York's LaGuardia Airport (LaGuardia). The rule grandfathers the majority of operations at the airport and will develop a robust secondary market by annually auctioning off a limited number of slots; the FAA plans to use the proceeds from the auctions to mitigate congestion and delay in the New York City area. In addition, the hourly cap on scheduled operations will be reduced to 71 per hour during the regulated hours. This reduction will lead to an estimated 41 percent reduction in modeled delay at the airport. This rule also contains provisions for use-or-lose, unscheduled operations, and withdrawal for operational need. The rule will sunset in ten years.

DATES: This rule becomes effective [insert date 60 days after publication].

FOR FURTHER INFORMATION CONTACT: For technical questions regarding this rulemaking, contact: Nan Shellabarger, Office of Aviation Policy and Plans, APO-200, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; telephone (202) 267-7294; e-mail *nan.shellabarger@faa.gov*. For legal questions

concerning this rulemaking, contact: Rebecca MacPherson, FAA Office of the Chief Counsel, 800 Independence Ave., SW, Washington, DC 20591; telephone (202) 267-3073; e-mail *rebecca.macpherson@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for this Rulemaking

The FAA has broad authority under 49 U.S.C. § 40103 to regulate the use of the navigable airspace of the United States. This section authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary for its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace.

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I. Background

This final rule is the latest action in a long history of congestion management at one of the most delayed airports in the United States. Although service at LaGuardia is almost exclusively domestic, access to the airport is highly sought after. These two factors have forced the FAA to address a dilemma: how can the agency reduce delays while providing some measure of access to carriers wishing to operate at the airport, thus ensuring competition? While there are many factors contributing to the delays and congestion at LaGuardia, demand for the associated airspace has long out-stripped capacity.

The FAA managed congestion at LaGuardia under the High Density Rule (HDR) from 1969 through 2006. 14 CFR part 93 subparts K and S. However, not until deregulation of the airline industry did the FAA need to step in and provide for air carrier

access to the airspace immediately surrounding the airport. Prior to 1985 the carriers at the airport, operating under antitrust immunity, determined who would be allowed to operate and when. The FAA's role was limited to determining how many operations air traffic control could reasonably handle during congested periods and enforcing operator compliance with the rules. The HDR divided the allowable operation (slots) by categories of users (i.e., air carriers other than air taxis, scheduled air taxis, and others). 33 FR 17896 (December 3, 1968). In 1982, the FAA imposed a minimum usage requirement for the first time. 47 FR 7816 (February 22, 1982). Also in 1982, the FAA implemented an experimental buy-sell rule, under which approximately 190 slots were transferred among carriers over six weeks of the program. 47 FR 29814 (July 8, 1982).[1]

The FAA established more permanent allocation procedures for slots under the HDR in 1985 when it adopted the Buy/Sell Rule. 50 FR 52195, December 20, 1985. In a companion rulemaking to the Buy/Sell Rule (SFAR 88), the FAA provided for the withdrawal of up to five percent of the slots at the slot-constrained airports through a reverse lottery so as to provide a pool of slots for new entrants and limited incumbents. SFAR 88, 51 FR 8630 (March 12, 1986). [2] The Buy/Sell Rule included use-or-lose provisions and, while explicitly stating that the slots were not the carriers' property and did not constitute a proprietary right, the FAA allowed carriers to buy, sell or lease the slots on the secondary market. For the next 15 years the agency relied primarily on the secondary market authorized by the Buy/Sell Rule to address access issues at the airport. However, the Buy/Sell Rule created market distortions by creating categories of carriers

[1] This slot program was not implemented under the HDR, but rather under SFAR 44 and was related to the limitations on air traffic control services resulting from the controller's strike.
[2] Commenters appear to have forgotten this rulemaking action when arguing that the withdrawal of slots for reallocation is unprecedented.

entitled to preferential treatment under an administrative reallocation mechanism which severely limited these carriers' access to slot-controlled airports other than on the open market. Affected carriers complained to the FAA that by grandfathering 95 percent of the slots at the slot-controlled airports to incumbent carriers, there was insufficient capacity available for reallocation. The Buy/Sell Rule also failed to foster a robust secondary market because it did not require any transparency. Accordingly, carriers were able to keep out competitors by arranging private transactions. This resulted in carriers interested in initiating or expanding service at the airports often being unaware that slots were potentially available for sale or lease. Some carriers also complained that they were effectively being denied access to the airport because their competitors refused to sell slots or provide meaningful lease terms.

On April 5, 2000, Congress enacted the Wendell H. Ford Aviation and Investment Reform Act of the 21st Century (AIR-21 or the Act). The Act phased out the HDR at LaGuardia effective January 1, 2007. In addition to phasing out the HDR, AIR-21 directed the Secretary of Transportation to grant two types of exemption from the HDR's flight restrictions. The first type of exemption was designed to promote more competition at slot-constrained airports and required the Secretary to grant exemptions to a new entrant or limited incumbent for 20 flights per carrier. The second type of exemption was aimed at improving service to small communities and required the Secretary to grant exemptions to a carrier operating an aircraft with less than 71 seats to Small-Hub or Non-Hub airports for an unrestricted number of flights. The Act also preserved the FAA's authority to impose flight restrictions by stating that "[n]othing in this section * * * shall be construed * * * as affecting the Federal Aviation

Administration's authority for safety and the movement of air traffic." 49 U.S.C. § 41715(b).

Although the slot exemptions mandated by Congress under AIR-21 opened up access to LaGuardia; they also resulted in a significant increase in delays at the airport as the number of small community exempted operations soared throughout 2000. Using its authority in 49 U.S.C. § 40103, the FAA capped AIR-21 slot exemptions at LaGuardia. While the number of allowable scheduled operations under the HDR remained constant at 62 per hour, the actual number of scheduled operations rose to 75 per hour[3] even though there were no significant increases in the airspace or airport capacity. Thus, Congress' actions to improve access resulted in significantly higher delays at LaGuardia than there were before 2000.

Slots allocated under the HDR at LaGuardia were scheduled to expire on January 1, 2007. Based on its experience in 2000, the FAA determined that simply lifting the HDR at LaGuardia would result in a significant increase in delays and adversely impact the airspace around New York City and on the National Airspace System (NAS) as a whole. Accordingly, on August 29, 2006, the FAA published a notice of proposed rulemaking (NPRM) proposing continuation of the existing cap of 75 scheduled and six unscheduled hourly operations as well as a new method of allocating capacity (71 FR 51360). In addition to retaining the existing cap, the FAA proposed to impose an average minimum aircraft size requirement for much of the fleet serving the airport. By incentivizing carriers to use larger aircraft, the proposal would have maximized passenger throughput consistent with the airport's physical constraints. The FAA also proposed to

[3] There are two hours during the day when scheduled operations exceed 75. At 9:00 a.m. there a total of 76 scheduled operations, and at 5:00 p.m. there are a total of 77.

implement a limit on the duration of the slots that would assure ten percent of the capacity at the airport would be available annually for reallocation based on an undetermined market mechanism that the FAA intended to administer via regulation.

The FAA recognized that it did not have clear statutory authority to implement a wide array of market-based mechanisms and that, absent authority beyond that contained in 49 U.S.C. § 40103, any reallocation via a market-based mechanism could lead to a challenge that the FAA had violated the "user fee prohibition" attached to the agency's annual appropriations legislation since 1998. The FAA did not address the agency's authority to dispose of interests in property, as provided in the Air Traffic Management System Performance Improvement Act of 1996. Pub. Law No. 104-264, codified at 49 U.S.C. §§ 106(l)(6). However, it did refer to its statutory reauthorization proposal, which was part of a comprehensive change to how the FAA would be financed. The FAA's proposed reauthorization package, the Next Generation Air Transportation System Financing Reform Act of 2007, would substitute new user fees for passenger ticket taxes, would permit the airport operators (such as the Port Authority of New York and New Jersey (Port Authority)) at constrained and delayed airports to assess market-based fees, and would also allow the FAA, under certain circumstances, to impose market-based mechanisms. This legislative proposal, in giving authority directly to airport proprietors to assess and use market-based fees, was profoundly different from the terms of this final rule. Rather, this rule recognizes the property interest the FAA acquires or constructs in the navigable airspace for scheduled flight operation and provides for the assignment of this property interest through lease agreements with the carriers. The FAA's

reauthorization legislation has been held up for reasons unrelated to this rulemaking, and the proposed legislation was never adopted.

The FAA recognized that it would be unable to complete its rulemaking by January 1, 2007, when the HDR was scheduled to expire. Indeed, since the agency had extended the comment period at the request of several interested parties, the comment period for the NPRM did not close until December 29, 2006. On December 27, 2006, after providing for notice and comment, the agency published an FAA Order *Operating Limitations at New York LaGuardia Airport* (LaGuardia Order) (71FR 77854).[4] The LaGuardia Order retained the existing cap at the airport of 75 scheduled operations and imposed a reservation system for unscheduled operations that permitted six unscheduled operations per hour. The LaGuardia Order did not distinguish between operations conducted pursuant to HDR slots and AIR-21 slot exemptions; rather, flights conducted pursuant to the exemptions were rolled into the hourly cap without restriction. The slots and exemptions were grandfathered to the current holder as "Operating Authorizations". The Order also explicitly linked its duration to the publication of a final rule and noted that no rights to Operating Authorizations allocated under the Order would survive beyond the Order. No one challenged the FAA's authority to re-impose caps at the airport following the expiration of the HDR or the terms of the Order.

In 2007 flight delays in the New York City metropolitan area soared. Delays impacted all three major commercial airports and cascaded throughout the NAS. The summer of 2007 became the second worst on record nationally for flight delays. On September 27, 2007, the Secretary of Transportation announced the formation of the New

[4] The LaGuardia Order was amended on November 8, 2007 (72 FR 63224) and again on August 19, 2008 (73 FR 48248).

York Aviation Rulemaking Committee (NYARC) to help the Department of Transportation (Department) and the FAA explore available options for congestion management and how changes to current policy at all three major commercial New York City airports would affect the airlines and the airports.

By design, the NYARC provided ample opportunity for extensive input by aviation stakeholders, having members from every major air carrier in the United States as well as foreign carriers, passenger groups, and the Port Authority. Through the ARC process, these stakeholders played a key role in exploring ideas to address congestion and ensuring that any actions contemplated by the Department and the FAA would be fully informed. In addition to holding weekly meetings of the full NYARC, five working groups regularly met to explore ways to address both congestion and allocation of the available airspace. The NYARC worked throughout the fall and submitted a report to the Secretary, dated December 13, 2007, discussing its findings. A copy of the NYARC Report may be found at http://www.dot.gov/affairs/FinalARCReport.pdf.

After evaluating the comments received to the 2006 NPRM and the input of the NYARC, the FAA moved forward with its rulemaking action to address congestion at LaGuardia. Rather than pursue its earlier proposal to require upgauging and reallocate ten percent of the existing capacity each year, the FAA published a supplemental notice of proposed rulemaking (SNPRM) on April 16, 2008 proposing to lease the majority of operations at the airport to the historic operators for non-monetary consideration under its cooperative agreement authority. The agency also proposed to develop a robust market and induce competition by annually auctioning off leases for a limited number of slots during the first five years of the rule. The FAA proposed two different options. Under

the first option, the FAA, after retiring a small portion of the slots, would auction off eight percent of the slots to any carrier serving or wishing to serve LaGuardia and would use the proceeds to mitigate congestion and delay in the New York City area (after the FAA recouped the cost of the auction). Under the second option, the FAA would not retire any slots and would conduct an auction of twenty percent of the slots. The proceeds would go to the carrier holding the slot after the FAA recouped the cost of the auction. The SNPRM also contained provisions for use-or-lose, unscheduled operations, and withdrawal for operational need. The FAA proposed to sunset the rule in ten years.

The comment period for the SNPRM closed June 16, 2008. Despite numerous requests, the FAA decided against extending the comment period, although it noted that it historically has considered comments filed after the end of a comment period as long as such consideration did not lead to delay. In denying these requests, the FAA provided draft copies of the lease agreements that would result from the initial allocation and reallocation of slots in the final rule. The FAA reiterated that any auction would be conducted under the agency's acquisition authority. The agency also reiterated that interested parties to the auction would be afforded the opportunity to comment on any proposed auction procedures within the context of the agency's Acquisition Management System.

Twenty-six interested parties filed comments to the docket addressing the SNPRM. The majority of comments were consistent in rejecting the proposal. Many commenters said that the FAA had failed to demonstrate how the proposal would achieve any significant relief from congestion. Rather, according to the commenters, the SNPRM would impose an untested and unproven auction process on airlines that would not

address the fundamental airspace congestion issues in the New York metro area. While other commenters did not completely object to an auction mechanism, they did note that the timing was not right or that the auction procedures needed to be fully developed prior to conducting any auction.

Effective August 28, 2008, the FAA reduced the number of reservations available for unscheduled operations from six to three. 73 FR 48428.

On September 30, 2008 the FAA's Office of Dispute Resolution for Acquisition (ODRA) issued a decision responding to protests that had been filed by air carriers, the ATA, the Port Authority, and the New York Aviation Management Association challenging the FAA's legal authority to conduct a proposed auction of two slots at Newark. ODRA concluded that the FAA's statutory authority and its Acquisition Management System authorized agency disposal of property rights by way of a lease as well as the use of a competitive auction process to determine who the lessee should be. ODRA did not, however, issue an opinion on whether the underlying slots constituted property.

On the same day the General Accountability Office (GAO) released an opinion letter in response to a congressional request that concluded that the FAA currently lacks authority to auction slots under either its property disposition authority or its user fee authority. The issues involved represent novel legal issues upon which reasonable people, and agencies, acting in good faith, have disagreed. The FAA disagrees with the GAO conclusions because it does not believe the auction of a slot constitutes a user fee and because the GAO appeared to apply an exceptionally narrow definition of property that ignores expansive statutory provisions within the agency's various enabling statutes

and the fact that carriers have treated slots as property for approximately 25 years. Accordingly, the FAA has decided to proceed with the adoption of this final rule.

II. Summary of the final rule

Today's rule considers not only the concerns raised by commenters in response to the NPRM and SNPRM, but also takes into account the extensive discussions and issues raised by members of the NYARC. The FAA is imposing a cap on scheduled operations of 71 per hour from 6:00 a.m. to 9:59 p.m., effective March 8, 2009. Until that date, the cap on scheduled operations will remain at 75 per hour. This reduction in the cap represents a five percent retirement of existing slots at the airport and should significantly improve delays at the airport. Unscheduled operations continue to be capped at three per hour, with additional flights authorized when conditions permit.

In addition, approximately 85 percent[5] of the total number of slots currently in use at the airport will be "grandfathered" to carriers who hold the corresponding Operating Authorization under the LaGuardia Order pursuant to cooperative lease agreements for a period of ten years. These slots are called "Common Slots". Carriers will not pay any monetary consideration for these slots. Of the remaining 15 percent of slots, one-third (or five percent of existing capacity) will be retired at the end of the winter scheduling season. These slots are called "Limited Slots", as are the remaining approximately ten percent of the slots, which will be terminated and reallocated over a five year period, commencing March 8, 2009. The FAA intends to conduct the first auction of these slots in January 2009, and the affected carrier will be permitted to use the slot until the successful bidder acquires it in March. The reallocated slots, called

[5] This rule will withdraw 16.5 percent of carriers' existing Operating Authorizations above the base of operations. Currently unallocated capacity will also be available for auction or retirement. This represents approximately 15 percent of the total number of slots at the airport.

"Unrestricted Slots" after reallocation, will be awarded to the successful bidder(s) via lease agreements that will last until this rule expires, March 9, 2019.

All slots may be transferred via a secondary market. Carriers may continue to engage in direct negotiations. To facilitate opportunities for participation in the secondary market, however, all available slot sub-leases must be advertised on an FAA-run bulletin board, and the Department will monitor transactions for anti-competitive behavior.

As proposed, Limited and Common Slots will be subject to an 80 percent usage requirement and may be withdrawn for operational need. In addition, Common Slots may be subject to reversion, following notice and an opportunity to comment, should the FAA determine the cap at the airport is too high.

III. Authority to retire and reallocate capacity

The Air Transport Association of America (ATA), the Port Authority, American Airlines, Delta Airlines and United Airlines asserted that the FAA's proposed methods of allocating slots are not lawful for several reasons including: prior statements by Government officials indicating that the FAA would need additional legislation to be able to auction slots; the FAA cannot create property by exercising its regulatory power to regulate the use of navigable airspace; slots are not property when created and held by the Government but only become property when transferred to an air carrier; the proposed lease of slots for fair market value would be a new user fee in violation of an appropriations restriction on using a particular appropriation to finalize or implement a regulation to establish a new user fee and in violation of the Independent Offices Appropriations Act (IOAA) (the latter of which it is asserted is the FAA's only authority

to charge for the lease of slots); the leases would be a unconstitutional usurpation of Congress' authority to levy taxes; the return of slots to the Government at the end of the term of their leases would constitute an unconstitutional taking of property; the Federal Grants and Cooperative Agreements Act does not provide authority for the FAA to give slots to air carriers through cooperative agreements; and the FAA lacks authority to retain the proceeds from the lease of slots and use those proceeds to improve capacity in the New York airspace area.

The FAA has the authority to dispose of property interests under 49 U.S.C. § 40110(a)(2). The FAA also has the authority to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration." 49 U.S.C. § 106(l)(6).[6] The FAA has determined that the allocation of a relatively small number of slots via the auction of a leasehold best effectuates the efficient allocation of slots, both through the initial allocation and through the development of a robust secondary market.

An auction is intended simply to distribute slots to the air carriers who value them the most, thus encouraging their most efficient use. An auction also satisfies the direction of Congress to "place maximum reliance on competitive market forces and on actual and potential competition . . . to provide the needed air transportation system . . . ." 49 U.S.C. § 40101(a)(6)(A).[7] This section of law describes the policies that the Department must take into consideration when issuing economic regulations. This rule is not an economic

[6] A federal agency's power to dispose of property includes the power to lease that property, even without express Congressional authority. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 331 (1936).

[7] This section of law describes the policies that the Department of Transportation must take into consideration when carrying out its economic regulatory authority over the aviation industry. This section also is a clear statement by Congress of a valid public policy aim that the FAA is permitted to take into consideration.

regulation. However, the statutory provision is a clear statement by Congress of a valid public policy aim that the FAA is permitted to take into consideration when issuing regulations under section 40103. The FAA does not intend to set a reserve price on slots so as to assure itself that it recovers its costs associated with either the auction or with providing air traffic services. The FAA instead aims to allocate all of the slots put up for auction, thus allowing for possible new entrants to compete with the incumbent air carriers at LaGuardia and to accommodate changes in the business strategies of air carriers using LaGuardia airport.

A. The FAA is legally authorized to allocate slots through an auction mechanism

Several commenters quote a statement made in 1985 that the FAA did not propose an auction mechanism because legislation would be required for the collection and disposition of the proceeds (50 FR 52183 (December 20, 1985)), and a more recent statement in the NPRM that the FAA "currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization". 71 FR 51360, 51362, 51363 (August 29, 2006).

In 1985, the FAA lacked clear authority to collect and dispose of the proceeds from an auction. Rather, any amounts collected by the agency would need to be deposited into the General Receipts account in accordance with 31 U.S.C. § 3302. Additionally, while the FAA had authority to dispose of an interest in property, it was not clear that such interests included leaseholds.

In the Air Traffic Management System Performance Improvement Act of 1996, Public Law 104-264, the FAA gained express authority to lease property to others. 49 U.S.C. §§ 106(l)(6), 106(n). The same law also gave the FAA an exemption from 31

U.S.C. § 3302, and an account was established specifically for all amounts the FAA collects other than the insurance premiums and fees that it is required to deposit into the Aviation Insurance Revolving Fund. 49 U.S.C. § 45303(c). This account is available not just for fees assessed under chapter 453, but for "all amounts" other than insurance premiums and fees.[8] Thus, the statement made in 1985 is no longer correct.

The circumstances surrounding the statement made in 2006,[9] did not address the authorities conferred on the FAA by the Acquisition Management System Act. The FAA has authority to lease property to others, and to receive adequate compensation for this temporary disposal of property, including the authority to lease the slots at LaGuardia.

As briefly discussed in the SNPRM, the FAA initially believed that imposing a market-based reallocation mechanism as part of the regulation could be problematic. However, as delays soared in the region in 2007 and Congress failed to pass long-term reauthorization legislation, the FAA reevaluated its options. One option was to simply extend the existing LaGuardia Order indefinitely. The agency rejected this option because the Order was never intended to be a long-term solution and it perpetuates the inefficiencies contained within the HDR. Likewise, the FAA could have pursued a final rule that would establish an administrative reallocation mechanism, but the agency concluded that approach also failed to resolve the inefficiencies contained within the HDR. Finally, the FAA could revisit all of its statutory authorities and determine whether it had the ability to allocate slots under its existing legal authorities.

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[8] The fact that Congress excluded insurance premiums and fees, which are not amounts assessed under chapter 453 of title 49, expresses Congress' plain and unambiguous intent for the FAA to deposit all amounts it collects into this account, not just the amounts assessed under the user fee provisions of chapter 453.

[9] Statements were also made in environmental assessments in 2005 and 2007 that indicated that legislation might be needed to implement market-based approaches to congestion management. These statements are too vague to determine whether they are correct with respect to the issue at hand.

This final approach was the one the agency pursued because the FAA believes it is both legal and best represents the interests of passengers flying in and out of the airport. The FAA also believes this approach best effectuates the FAA's mandate to provide for the efficient use of the NAS, coupled with the Department's mandate to consider competitive effects. The agency can either foster a market-based allocation mechanism and develop a robust secondary market, or it can walk away from the airport after imposing a cap and providing for a very limited administrative reallocation mechanism. It has decided to follow the more free market approach.

The commenters also refer to the fact that the FAA sought additional legislative authority to conduct auctions which it is has not yet received. The authority sought by the FAA was part of a comprehensive change to how the FAA would be financed and how market-based mechanisms would be used by both the FAA and congested airports. This rule, however, relies on the FAA's Acquisition Management System authorities and does not require the FAA to use any of the proposed legislative provisions it sought.

1. Slots are a form of property that may be leased by the FAA to others

Both the Port Authority and the ATA submit that the FAA has no property rights in the slots the FAA proposes to auction.[10] While the ATA does not question that the slots are property (it disputes ownership), the Port Authority states that the slots are "neither physical property, real property, intellectual property, nor an intangible property recognized in common law."[11]

[10] The Regional Airline Association (RAA) makes a similar argument. In addition, RAA states that the FAA lacks the authority to regulate the types of aircraft and routes to be served in air transportation. The FAA disagrees with the premise of RAA's position, since the FAA may rely on a rational basis to allocate the use of navigable airspace under 49 U.S.C. §40103. Nevertheless, this rule does not attempt to regulate the type of aircraft or the routes served in any manner.

[11] The Port Authority also uses the language in the preamble to the SNPRM as evidence that the slots are not property because the FAA stated that there was no Fifth Amendment Takings issue with the proposed

The Port Authority is incorrect; slots are an intangible form of property that may be leased. On December 27, 2006, the FAA issued an Order limiting operations at LaGuardia pursuant to its broad authority to regulate the use of navigable airspace under 49 U.S.C. 40103(b). 71 FR 77854 (December 27, 2006). That Order defines an Operating Authorization[12] as "the operation authority assigned by the FAA to a carrier to conduct a scheduled arrival or departure operation. . . ." *Id.* at 77859. The Order expressly allows the trading and leasing of Operating Authorizations. *Id.* at 77860. Although the Order does not permit the permanent sale or purchase of Operating Authorizations, it permits any form of consideration to be used in the lease or trade of these Operating Authorizations. *Id.* at 7857. In addition, the Order states that it "is not intended to prohibit an air carrier from contractually arranging to pledge an interest in an Operating Authorization to a person, for use as collateral or otherwise, for the duration of the Order." *Id.*

This Order reflects the FAA Administrator's determination that Operating Authorizations are a form of property that may be leased or traded for consideration, and used as collateral. Indeed, the ATA's own members have treated Operating Authorizations, and the HDR slots that predated them, as a form of at least intangible property: leasing and trading them for consideration; using them as a form of collateral; and disclosing them as assets on their balance sheets. Bankruptcy courts have held that slots are property.

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slot auction. The FAA's statement, in context, went to the fact that the air carriers have no property interests in the slots after expiration of the current Order until FAA provides them with new slots. It did not imply that the slots were not property; just that the air carriers possess no property interests beyond those accorded them under the Order.

[12] As the preamble to the current SNPRM states, the earlier Order and NPRM used the term "Operating Authorizations" to describe what are called slots under the SNPRM. Both Operating Authorizations and slots represent property interests, but the FAA has deferred to common usage by reverting to the term "slots."

The Port Authority cites Executive Order 13132 for the proposition that the FAA is ignoring the traditional role of States as sovereigns that can create property and has not closely examined the effect the rulemaking would have on the State instrumentality. The creation of property rights, however, is not the sole responsibility of the states. Federal law determines what constitutes property for the purpose of applying federal statutes. *Ross L. Blair, et al. v. United States*, Docket 2007-5049 (Fed. Cir. 2008), citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) and *United States v. Craft*, 535 U.S. 274, 278-79 (2002). The United States Government, pursuant to 49 U.S.C. § 40103, has exclusive sovereignty over the navigable airspace, and the FAA exercises plenary powers over that airspace.

Unlike the Port Authority, the ATA does not dispute that the slots constitute a property interest; rather it argues that the property interest is not the FAA's, because it is created at or after the transfer to an air carrier.[13] Section 40110(a)(2) does not speak to whether the FAA actually owns property that is being disposed of. It only speaks to the disposal of a property interest. Only the FAA has authority to assign the use of navigable airspace under section 40103. Even assuming that the property interest is created at the time of transference, it is still a property interest that falls within the FAA's authority to dispose of under section 40110(a)(2).

As with certain other valuable public property not expressly owned in fee by the U.S. Government, the Government may allow the use of public property and frequently does so using leases. In fact, the Government routinely "licenses" and "permits" the use of property over which it exercises exclusive sovereignty. In doing so, unless otherwise

[13] The airline commenters agree with ATA's assessment that the slots are property of the airlines not of the FAA. *See*, Comments of U.S. Airways Group, Inc. at 24. *But see*, Comments of American Airlines at 7 stating that the Port Authority holds the property interest.

specified by law, the Government charges market rates in accordance with OMB Circular A-25. For example, under 36 CFR 251.53 – Authorities, the Chief of the Forest Service (USDA) issues special use authorizations (e.g., permits, term permits, leases) for National Forest System land. The USDA also issues grazing permits under the Taylor Grazing Act (TGA) of 1934 to allow the permit/lease holder to use publicly owned forage. The Federal Communications Commission licenses portions of the broadcast spectrum, and since 1993 (four years before Congress mandated the use of auctions) has frequently done so using auctions.[14] The General Services Administration issues licenses and permits for the use of its buildings and property, *see, e.g.,* 41 C.F.R. 101-47.901, 101-47.309; *see also,* GSA form 1582, "Revocable License for Non-federal Use of Real Property." The FAA similarly uses "licenses" to, in effect, lease its real property to non-federal users. *See,* 1.3.7 of the FAA's Real Estate Guidance, http://fast.faa.gov/realestate/index.htm .

In short, licenses frequently are used to provide non-federal parties access to public property regardless of whether that property be real or personal (including intangible)[15] and whether the Government owns the property in the traditional sense or is simply its guardian. The FAA selected the word "lease" rather than "license" to describe the documents that will transfer slots to air carriers because the FAA is conveying a longer term interest, with fewer rights by the Government to terminate that interest, than is usually done when the Government licenses a non-federal entity to use public property (licenses of property are usually terminable at will).

[14] The FCC, like the FAA, had a statutory preference for competition prior to the requirement that it conduct auctions.
[15] Such as authorized access to particular radio frequencies and authorized use of intellectual property.

2. FAA leases are not covered by IOAA and this rule is not in violation of any current appropriations restriction

The ATA argues that the only authority by which the FAA may charge for the lease of slots is as a user fee under the Independent Offices Appropriations Act (IOAA) and that the only amount that could be charged is the cost of administering the lease. The ATA is incorrect on both points, but the issue is not relevant because the FAA does not rely on IOAA authority to conduct auctions but on its other authorities.

The ATA similarly argues that this regulation falls within the parameters of an appropriation provision that prohibits the FAA from using funds from its operations appropriation to finalize or implement a regulation that establishes a new user fee not specifically authorized by law.[16] Consolidated Appropriations Act, 2008, P.L. 110-161. The ATA also suggests that the wording of 49 U.S.C. § 106(l)(6)[17] means this authority may not be used because the FAA may only enter into leases using this authority if the

[16] ATA also suggests that by finalizing or implementing this rule, the FAA would violate the Anti-Deficiency Act The Anti-Deficiency Act would only be violated if the FAA obligated or expended funds in excess or in advance of an available appropriation, fund, apportionment or other applicable administrative subdivision of funds. 31 U.S.C. §§1341, 1517. The FAA may not use its operations appropriation to finalize or implement a rule to promulgate a new user fee not specifically authorized by law, but this rule simply reduces the number of slots (lowers the cap) at LaGuardia, defines the different types of slots, establishes a reversion of 15% of the slots, and discusses the FAA's intent to auction new or returned slots. This rule does not require or impose on any entity a requirement to pay the FAA to obtain a service or even a slot. If the FAA does conduct an auction as contemplated by this rule, it will do so using its pre-existing authorities and regulation. The use of its operations appropriation to finalize and implement this rule therefore does not violate the Anti-Deficiency Act.

[17] American Airlines reads 49 U.S.C. §106 as more limited in scope regarding the types of property that fall under its purview. The statute does not limit its scope to any particular type(s) of property that fall under its purview. The FAA has for years, without challenge, interpreted its authority broadly under the statute in support of Congress' intention of allowing the Administrator to acquire, lease, enter into cooperative agreements and other transactions as may be necessary to carry out the Agency's functions. This interpretation is known to Congress, which has repeatedly reauthorized the FAA without making a change to this section. Another commenter raised the fact that the heading of section 106(l) refers to "Personnel and Services" which the commenter says means that subparagraph (6) of that section does not provide the FAA any contracting or leasing authority. It has been long recognized by the courts, however, that the headings of statutes have little if any weight in statutory interpretation. As other paragraphs of this section deal with personnel matters, the heading is not erroneous, but it does not in anyway dilute the broad grant of contracting, leasing, cooperative and other transaction agreement authority Congress gave the FAA in paragraph (6).

leases "may be necessary to carry out the functions of the Administrator and the Administration." 49 U.S.C. § 106(l)(6). The ATA argues that the only necessary function is a regulatory function to assign airspace under 49 U.S.C. § 40103. However, there are several other statutory functions, such as using procedures that provide for an efficient air traffic system, 49 U.S.C. § 44505, and the desirability of placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system, 49 U.S.C. § 40101(a)(6), that make the use of the FAA's commercial authority to lease property to others appropriate. *See also*, the legislative history and findings of Congress when it granted the FAA the authority to lease property to others in Public Law 104-264. Having created slots, and determined the number of available slots should be limited because of the resulting strain on the NAS from the scheduling of more flights per hour than can be handled under current conditions at LaGuardia, the function of disposing of its interest in the slots becomes applicable.

Even if the only "necessary function of the Administrator or Administration" were a regulatory one, the FAA has not violated the appropriations restriction. Simply put, a lease is not a user fee. A user fee is imposed for a particular service the Government provides to a particular party. A lease on the other hand, is a transfer of a possessory interest in real, personal or intangible property that allows the lessee the use of that property to the exclusion of others including the lessor. In transferring slots to air carriers for defined periods of time, the FAA is not providing any air traffic or other service to the recipients. To the contrary, the FAA's air traffic controllers will not be policing or otherwise cognizant of which air carrier owns which slot and will provide

their services in accordance with the FAA's Orders and policies (predominantly first come, first served). In transferring slots to air carriers, the FAA is allowing that air carrier to schedule or reserve access to that segment of navigable airspace that is necessary to take off or land an aircraft at LaGuardia during a particular half hour of time. In short, the FAA is leasing rather than providing a service to air carriers when it transfers slots to them.

A user fee is calibrated to recover the cost to the government of providing a service or specific benefit to an identifiable recipient. See, e.g., *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *Seafarers International Union of North America v. Coast Guard*, 81 F. 3d 179, 182-83 (D.C. Cir., 1996). The assignment of a use of navigable airspace for scheduled flight operations is not a "user fee" under the principles articulated in those cases.[18] The cost associated with purchasing a particular slot does not constitute a user fee. First, the cost associated with procuring a slot at auction is not associated with the cost of providing air traffic services for that particular take off or landing. Rather, air traffic services are paid for already through the Airport and Airway Trust Fund receipts. Second, the FAA is not creating assignments of the use of navigable airspace for scheduled flight operations (slots) for the purpose of raising revenue by leasing them to air carriers. More precisely, the FAA has imposed a cap and designated slots for the purpose of allocating the efficient use of navigable airspace. Most of these slots will be awarded to current operators to prevent disruption of air services into and out of LaGuardia. The FAA is leasing a relatively small number of them, by means of an auction, to air carriers in order to draw in new entrant carriers and provide an opportunity

[18] The FAA implemented its regulation to lease its property to others on April 1, 1996, well prior to the first time a restriction was included in the FAA's appropriation concerning the FAA's ability to use the operations funds appropriated to develop or implement a new user fee.

for expansion by carriers already at the airport, thereby inducing airline competition at LaGuardia and ensuring that airlines winning the slots make the highest and best use of them. The auction is also designed to assure that air carriers will rationalize the use of their slots in accordance with the value attached to them in the auctions, and ultimately, in the secondary market. In the end, the travelling public will benefit.

3. Leases are not taxes

A tax is generally defined as an enforced obligation to support the government. See *United States v. La Franca*, 282 U.S. 568 (1931); see also *United States v. Butler*, 297 U.S. 1, 61 (1937); *Head Money Cases*, 112 U.S. 580, 596 (1884); *Rural Telephone Coalition v. FCC*, 8388 F. 2d 1307, 1313 (D.C. Cir., 1988); *United States v. City of Huntington*, 999 F. 2d 71, 73 (4th Cir., 1993). A lease acquired through a slot auction, however, is not a tax. It is not an amount being levied on all members of the industry nor is it a mandatory payment as a tax would be. Further, the lease is not "imposed" as a tax is, and is not designed for revenue-raising purposes.

The auction of a limited number of slots at the airport was never designed to provide the FAA with a new source of revenue. Indeed, in the SNPRM, one of the options proposed by the FAA was to allow the carriers to keep all revenue after covering the FAA's costs in conducting the auction. Rather, the auction mechanism is intended to use market forces to best allocate this limited asset to those carriers who value it the most, placing the asset to its best and highest use. The FAA believes the slots auctions will inform the airlines of the market value of their LaGuardia slots so that slot utilization can be rationalized. While it is true that under today's rule, that the FAA may realize some revenue from the auction, the agency has also committed to putting that revenue

back into aviation capacity enhancement and delay mitigation projects in the New York metropolitan area.

Unlike a tax, which imposes an obligation on affected citizens or consumers to pay money to the state, the slot auction imposes no burden on a carrier based on its citizenship or use of the airport. The slot auction lease payments are voluntary: the FAA does not require a carrier to participate in an auction in order to serve LaGuardia. Carriers serving LaGuardia presently will be given slots through cooperative agreements and slightly less than ten percent of the total number of slots at the airport will be auctioned. Only the carriers winning the bids at the slot auctions will pay for the lease, and that amount of money will have been determined by the free market. The FAA will not have pre-determined a lease amount and will not attempt to cover its costs in conducting the auction by setting a reserve price.[19]

4. The FAA's authority to give slots to air carriers through cooperative agreements

A few commenters stated that the Federal Grants and Cooperative Agreements Act does not provide the FAA authority to give slots as cooperative agreements. The Federal Grants and Cooperative Agreements Act defines when a cooperative agreement is to be used. The FAA's broad authority to award cooperative agreements, was given to the FAA in the Air Traffic Management System Performance Improvement Act of 1996, and codified as 49 U.S.C. § 106 (l)(6). This Act expressly confers on the FAA Administrator the authority to "enter into and perform such… cooperative agreements,

[19] As discussed in the general discussion of the auction procedures posted under the FAA's Acquisition Management System, the FAA will set a reserve price to assure that, in the event only a single bid is received for a particular slot, the bidding carrier does not actually pay the bid price. In that instance, the winning bidder would pay only the reserve price.

and other transactions as may be necessary to carry out functions of the Administrator and Administration. The Administrator may enter into such… cooperative agreements, and other transactions with… any person, firm, association, corporation… on such terms and conditions as the Administrator may consider appropriate." 49 U.S.C. §106(l)(6). There are several functions of the Administrator for which it may be "necessary" to enter into a cooperative agreement. One such function is to encourage the development of civil aeronautics. 49 U.S.C. § 40104. By giving up to 20 slots to all air carriers currently operating at the airport, and 85 percent of the remaining slots to the air carriers currently operating at LaGuardia in proportion to their current operations, the FAA is encouraging those air carriers to continue their development of civil aeronautics at the airport and in the routes served to and from that airport. As several commenters noted, there is substantial economic value both to New York and the communities served by flights from LaGuardia.

American Airlines raised an additional concern about the use of cooperative agreements, based upon the language in 49 U.S.C. § 40110(a)(2) that requires the FAA to receive "adequate compensation" for the disposal of property interests. The FAA finds that it is receiving "adequate compensation" through the minimum slot usage requirements. In addition, the slots are being given in order to promote civil aeronautics.

5. Leases that terminate by their own terms are not a "taking" of property

The ATA and the air carriers argue that the proposed auctions constitute a taking by the government and that the taking is prohibited for several reasons including that it is not for a legitimate purpose, it lacks due process, and fair value is completely absent in

the proposed option 1 and inadequate in option 2. The FAA strongly disagrees with the contention that the slot auctions contemplated in this rule are in any way an impermissible taking.[20] First and foremost, in order to be a taking, the air carriers would need to have a possessory interest in the slots and they do not. For bankruptcy purposes, air carriers may have acquired a property interest in slots, as discussed above, but as also cited in those cases, if that interest expires under the terms under which it was granted, then there has been no property right to be taken. The Order establishing Operating Authorizations at LaGuardia was of a fixed duration and any rights the air carriers may have had in those operating authorizations will automatically terminate when this rule becomes final.

Slots transferred to air carriers using cooperative agreements or leases awarded as the result of auctions will similarly have express automatic termination provisions. For slots transferred using cooperative agreements, the air carriers' property interest would automatically terminate if the specified "use or lose" provisions are not met or one of the other conditions specified in the cooperative agreements arises. If those provisions are satisfied, then most of these slots will terminate in 10 years. A few will have varying termination dates as agreed upon by the FAA and each carrier.[21] When the termination date arrives, any property interest the air carrier may have in the slot similarly automatically ends. There is no more a taking of air carrier property than there would be in the eleventh year of a ten year lease of FAA real property to an air carrier.

[20] The preamble to the SNPRM also addresses this issue and provides the Supreme Court decisions supporting the FAA's position.

[21] Perhaps more accurately, the determination of which of these slots have which of the specified termination dates will follow the process described in this rule.

The ATA and the air carriers provide little support for the proposition that Operating Authorizations or slots awarded to carriers under an order with a fixed duration results in entitlement to those slots in perpetuity.[22] To the extent that these commenters allege harm (such as having made investments in airport infrastructure) based on the unreasonable assumption that the status quo would remain forever even though the Order explicitly said it would expire, that harm is the responsibility of the air carriers. These carriers took a risk, for which they have received a return on their investment based on their use of the Operating Authorizations for the period specified in the Order. If these commenters do not wish to incur a significantly smaller risk[23] for a relatively small percentage of the slots that will be initially be transferred to them through cooperative agreements, and then returned to the FAA as those agreements expire in order to be auctioned, the carriers are free not to apply for these cooperative agreements.

The ATA and the air carriers rely on what they perceive as a three pronged test established in *Penn Central Transp. Co v. New York City*, 438 U.S. 104 (1978). In *Penn Central* the Court found that there was no compensable taking when the City's Landmarks Preservation Law would not allow additional stories to be added to Grand Central Station. Even using the three prong test articulated by the commenters, for the reasons stated above, the activities described in this rule would not constitute a Fifth Amendment taking.

[22] U.S. Airways Group's main contention is that the slots are property of the airlines because they have held them "more or less continuously" for 40 years.

[23] Unlike the operating authorizations provided under the LaGuardia Order, where the date of the termination of the carriers' property interest could not be known with absolute certainty other than it would be when this final rule becomes effective (it admittedly has taken longer than the FAA contemplated to issue this final rule) the slots that will be awarded as the result of an auction have a firm term of ten years, with little right by the FAA to terminate prior to the end of that term. Most of the cooperative agreements will similarly have a ten year firm term.

The ATA also overstates the extent of the alleged harm. Under the option selected in this rule, air carriers will get to keep, at a minimum, approximately 85 percent of their current slots and for all but eight airlines, they will get to keep 100 percent of their current slots.

The Port Authority cites to *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), for the proposition that the Federal Government's sovereignty over airspace is not ownership in fee, but rather navigational servitude. *Air Pegasus*, however, stands for the proposition that there is no private property right of access to navigable airspace. If the FAA legitimately exercises this authority to prohibit the use of a segment of navigable airspace, there is no property taken for Fifth Amendment purposes. In *Air Pegasus* a heliport operator was found to have no private property rights in its facility even though it lost all opportunity to generate revenue (and went out of business) after the FAA shut down much of the airspace around Washington, D.C. following the attacks of September 11, 2001.

6. The draft lease terms included in the NPRM were for illustrative rather than probative purposes

The ATA also uses the draft Lease agreement as evidence that the FAA does not have the authority to lease the slots. The ATA places far too much reliance on an early draft document that was provided to give commenters some idea of the type of lease the FAA was considering. For example, the standard clauses in the FAA's Acquisition Management System (AMS) use the word "contract" instead of "lease" because leases are a form of contract. The AMS, however, by its explicit terms applies to the acquisition and lease of property. *See*, Section 4.2 of the Acquisition Management System, and Real

Estate Guidance, http://fast.faa.gov/realestate/index.htm and T3.8.1 of the FAA's Procurement Guidance, also located at http://fast.faa.gov The FAA acknowledges that some of the terms in the sample lease that the FAA provided for illustration were not appropriate for a lease of slots, and will modify any proposed leases accordingly. An additional opportunity to comment on these terms will be provided prior to any auction. These sample terms, however correct or incorrect, have no bearing on whether the FAA has the authority to enter into leases. Similarly, because Attachment A was not included in the sample lease, the ATA argues that is evidence that there is no property the FAA can lease. Attachment A will be the particular slots each carrier receives. Each Attachment A will be unique for each particular airline. Before the slots are given or auctioned, there is no way to tell what any particular Attachment A will look like, therefore no Attachment A was provided. Instead the sample lease simply provided notice that there will be an attachment that will describe which slots the lessee (or cooperative agreement holder) will have.

B. The FAA has authority to retain the amounts received from the lease and disposal of property and to use those proceeds for congressionally authorized purposes

The commenters assert that the FAA has no authority to retain the amounts received from the lease of slots, and that 31 U.S.C. § 3302 requires all amounts received by an agency be deposited into the General Receipts account. The FAA, however, has an express exemption from 31 U.S.C. § 3302 that it was given in § 276 of the Air Traffic Management System Performance Improvement Act of 1996, Public Law 104-264, codified at 49 U.S.C. § 45303(c). Section 276 states that "Notwithstanding section 3302 of Title 31, all fees and amounts collected" by the FAA, except for a few specified

exceptions such as insurance premiums, "shall be credited to a separate account established in the Treasury and made available for Administration activities; . . . ." 49 U.S.C. § 45303(c). These amounts are available immediately for expenditure for Congressionally authorized purposes and remain available until expended. *Id.*

This paragraph of section 45303, by its unambiguous terms, applies to all amounts collected by the FAA, whether or not they are amounts from fees established under chapter 453. This is in contrast to the first paragraph of this section of law, which only applies to fees and amounts collected under chapter 453. [24] Fees collected under chapter 453 include fees for air traffic control services provided to planes that neither take off from nor land in the United States (overflight fees), and fees for airmen certificates and registration of aircraft.[25] The FAA, however, collects amounts under authorities contained in other chapters of law, such as insurance premiums and other amounts which are collected under chapter 443 of Title 49, amounts from the disposal of an interest in property for adequate consideration under chapter 401, and amounts provided from other air traffic service providers also under chapter 401, as well as federal, state and local governments and private entities under chapter 1 of Title 49.

It is a well established principle of statutory interpretation that laws ought "to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 32 (2001). Interpretations of statutes should "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citing *Inhabitants of*

[24] Section 45303(a) directs that all fees imposed and amounts collected under chapter 453 are payable to the Administrator of the FAA.

[25] Fees collected under the authority of 49 U.S.C. §45302, namely fees for issuing airmen certifications and registration of aircraft, in accordance with the express language in that section and language that historically has been in each appropriation, are credited to FAA's operations appropriation.

Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883)). Using this principle, effect must be given, if possible, to the words "all fees and amounts" except for those specifically excluded, should be deposited into the account established by 49 U.S.C. § 45303(c). The only amounts the FAA is expressly authorized under this paragraph to exclude from this account are the insurance premiums and related fees it collects and deposits into the Aviation Insurance Revolving Fund. A plain meaning interpretation which gives effect to all the words in that paragraph is that all fees and other amounts collected by the FAA under authorities contained in other chapters of Title 49 or other titles should be deposited into the account established by § 45303(c). This would include any amounts collected from the lease of FAA property under the authority of 49 U.S.C. § 106(n) and 49 U.S.C. § 40110(a)(2).

C. The auction of slots does not affect the proprietary rights of the Port Authority

Similarly, both the Port Authority and the Airports Council International – North America (ACI-NA) as well as American Airlines believe that the SNPRM impinges on the proprietary rights of the Port Authority. The ACI-NA believes that the FAA's powers under 49 USC Section 40103 do not allow us to auction slots. In support of its position, the ACI-NA also cites to *Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 956-57 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2nd Cir. 1987). The FAA maintains that *Western* supports its position more than that proffered by the ACI-NA. *Western* concluded that the perimeter rule established by the Port Authority was a valid restraint exercised in accordance with the Port Authority's proprietary interest. *Western* did not suggest that the proprietary interests of the Port Authority take precedence over FAA regulation; instead *Western* explicitly states that "[t]his Court

concludes that, in the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serve an equally legitimate local need and fits comfortably with that limited role, which Congress has reserved to the local proprietor." *Id.* at 958. Therefore, even if there were a conflict between the proposed rule and the Port Authority's proprietary rights, the FAA's rule would prevail under *Western*.

The establishment of slots under § 40103 is consistent with the authority that the FAA has exercised at LaGuardia for the past several decades. *Western* is easily distinguishable from the current rulemaking in that this rulemaking does not affect in any way how the Port Authority deals with its airport including use of its terminals. In fact, there will be 95 percent of the air traffic coming into the airport during the same time periods as currently exists at the airport. The only change will be the result of the five percent reduction in capacity.

The Port Authority's assertion is that changing the airlines that come in or the number of flights interferes with its proprietary interests. However, through its regulatory process in certifying airlines or capping arrivals and departures, the FAA can and has affected the air traffic in and out of LaGuardia and neither the Port Authority nor any other entity has challenged the FAA's responsibility to issue certifications or control the flow of air traffic, much less suggested it affects the proprietary rights of airport authorities. Additionally, the Port Authority has always had to accommodate carriers under the HDR by accommodating airlines that leased, purchased, or traded slots under the HDR; that received slots through FAA-run lotteries; or that were granted slot exemptions under 49 U.S.C. §§ 47174 and 41716. Furthermore, the Port Authority is

obliged to file competitive access reports to the Secretary if it denies access to a requesting carrier at LaGuardia. Accordingly, the Port Authority may not claim that the fact that a slot is acquired through an auction presents any unusual accommodation issues that it has not routinely dealt with in the past.

D. The FAA has complied with the Administrative Procedure Act

1. The docket contained adequate information for meaningful comment on the rulemaking proposal

Several commenters also claimed the FAA failed to meet the requirements of the Administrative Procedure Act (APA) (5. U.S.C. §§ 551, et sec.). The Port Authority claimed that relevant documents either were not submitted to the docket at all, or in a form and time insufficient to permit adequate analysis by interested parties. In particular, the Port Authority suggested the draft lease documents were submitted to the docket well after the initiation of the comment period, contained vague terms, and did not adequately set forth the conditions for default. The Port Authority maintained the default conditions are critical because of the impact of a default on the Port Authority's gate leasing agreements. The Port Authority also claimed that it could not adequately evaluate the appropriateness of the proposed usage requirement and the potential impact on small communities because relevant documentation was, in the first instance, not submitted at all, and in the second instance, submitted for the first time only days before the close of the comment period.

The ATA commented that the technical report explaining how slots would initially be allocated does not adequately describe how the FAA intends to draw down operations in excess of 75 per hour (in the 0900 and 1700 periods) under Option 2. It

claimed this omission calls into question whether the FAA truly meant to cap operations at 75 under Option 2.

The FAA believes the docket submissions provided interested parties with sufficient information to meaningfully comment on the proposal. The draft lease agreement for Unrestricted Slots, while provided relatively late during the comment period, is directly related to the FAA's potential auctioning of the slots under its acquisition authority. The draft cooperative agreement, which would govern the lease terms of the Common and Limited Slots, is arguably more directly related to the instant rulemaking since they will initially be allocated to carriers under this rule. While the Port Authority questions the comprehensiveness of these draft leases, they are in fact, largely complete. The FAA is intentionally placing only limited constraints on the slots. The goal of this rulemaking is not to impose complicated and intrusive constraints on the slots. Rather it is to allow for a more efficient air traffic system in and around LaGuardia while permitting some access to new entrants and stimulating the free market. In order to maximize efficiencies, the FAA must assure that the majority of the slots have a usage requirement. That requirement, which is mandated by today's rule, is the primary restriction on the Common Slots. Limited Slots are granted for a shorter period of time, but otherwise largely mimic the Common Slots. The Unrestricted Slots are even less constrained with no usage requirement.

As to the Port Authority's assertion that the potential impact on small community service was only provided days before the comment period closed, the Port Authority is mistaken. This documentation was submitted a second time at the Port Authority's request. It had claimed that it could not read the data in the original submission.

However, neither the FAA nor any other commenter to the rulemaking claimed to have any difficulty reading the original document. The second submission was filed as a courtesy to the Port Authority. As to the Port Authority's final claim that it was unable to evaluate the appropriate usage rate because there was no documentation in the docket, the FAA continues to believe that the Port Authority is uniquely situated to evaluate the extent to which carriers utilize the existing slots because it controls the gates at the airport. The 80 percent usage requirement at the airport has been in place at LaGuardia for approximately 25 years, and the FAA has not historically seen a need to further increase the usage requirement. The FAA's suggestion in the SNPRM that the Port Authority demonstrate why it believed that the existing usage requirement was too lenient was based on the fact that the Port Authority made this claim without any data. The FAA assumed that, as the airport proprietor, the Port Authority had some basis for its claim and suggested the airport provide any relevant data. Thus, the FAA is puzzled as to why the Port Authority would now claim that it needs to see data generated by the FAA to substantiate its claims.

As to the ATA's claim that the technical report failed to describe how the FAA would pull down a total of three operations under proposed Option 2 when the report explained how those same three operations would be pulled down under proposed Option 1, the FAA believes that the technical report was sufficiently clear. In any event, the FAA has decided against adopting Option 2 and providing a separate reduction in capacity in the two hours where existing scheduled operations exceed 75.

2. The discussion of the auction process provided sufficient detail for meaningful comment on the rulemaking proposal

US Airways argued the FAA provided insufficient time to comment on the details of the auction process. United claimed that the SNPRM should have proposed dates as to when the auctions would be conducted and should have committed to providing a certain amount of advance notice. The ATA claimed that the FAA violated the APA by failing to account for carrier's costs in participating in an auction.

In the SNPRM the FAA provided only a general discussion of the procedures that would govern any future auction. This general discussion was provided only to give interested parties a context for the rulemaking. One of the primary complaints about the NPRM was that the FAA failed to give any detail about the market-based mechanism it intended to use under that proposal. Consequently, the commenters provided very little analysis of the proposal to have ten percent of the slots at the airport expire every year, other than to say that it was overly disruptive. Because the FAA intended at that point to impose a market-based reallocation mechanism by regulation, the FAA believes the commenters complaints were valid. The agency does not believe that complaint was valid with regard to the SNPRM. However, the agency was also concerned that while the SNPRM did not propose to implement a market-based reallocation mechanism, commenters would continue to complain that they could not meaningfully comment if context were not provided. Thus, the FAA decided to provide a general description of the likely auction procedures to encourage meaningful comment on the underlying proposal, which is that after imposing a ten-year cap to address congestion, a certain number of slots would revert to the FAA for retirement or reallocation. The FAA has provided a more detailed discussion of the procedures that would be used in an auction. 73 FR 53477. September 16, 2008. The agency provided for a 15-day comment period

which closed on October 1, 2008. Based on the comment submissions, the FAA may decide to refine any final auction procedures. That refinement, however, does not impact this rule.

Some commenters claimed that because the FAA has not fully developed the auction process, the FAA cannot finalize the proposed rule. Like the ATA and the draft lease documents, these commenters place far too much reliance on procedures unrelated to the rulemaking. The SNPRM discussed in detail the process for providing slots at LaGuardia: approximately 85 percent of them will be provided to incumbent air carriers operating at that airport through cooperative agreements and the remaining ones will be either transferred via lease or retired. The particulars of the auction process (e.g., will it all be via the internet or will paper bids be allowed, will the help desk be available 24/7 or only during normal business hours, the exact day when the auction will take place, whether successive rounds of bidding will be allowed, whether multiple bids from the same carrier will be permitted) are not relevant to this rule. The FAA will, in accordance with its Acquisition Management System, continue to provide adequate notice of its planned auction procedures and solicit comment on those procedures prior to conducting any auction.

The ATA's claim that not ascribing the costs of the auction to the rule violates the APA likely stems from unclear drafting on the part of the FAA. We have included the auction costs and reallocation benefits in the final regulatory evaluation for this rule.

3. The FAA adequately considered alternatives

Despite the fact that the FAA has proposed a total of three different allocation methods in this rulemaking, several commenters claimed that the agency failed to

adequately explore additional alternatives in violation of the APA. An agency is not required to consider all possible alternatives when engaging in rulemaking. The fact that the commenters dislike the alternatives considered does not mean that the FAA has pre-decided the outcome by failing to recognize that there may be other alternatives. In fact, the agency proposed multiple options. In addition, it has considered many of the alternatives that the commenters recommended in response to the SNPRM. As discussed later in this document, the FAA has decided against adopting these approaches in lieu of proceeding with a final rule. However, aspects of many of these recommendations have been incorporated into the rule or are being addressed elsewhere.

IV. Discussion of the final rule

A. Allocation of slots at LaGuardia

The FAA believes that at least for the next several years, LaGuardia will likely be oversubscribed in terms of its physical ability to handle aircraft. Simply put, expansion of the airport by adding runways is not a viable option given its location. Accordingly, a cap on operations at the airport is necessary to provide for the efficient use of the NAS.

No commenter has suggested that there is no need to cap the airport. While the ATA had initially claimed in 2006 that there was inadequate justification to retain the cap, no commenter, including the ATA, still appears to believe the cap should be lifted.

Rather, the dispute surrounding this rulemaking revolves around the FAA's proposal to either retire or reallocate slots at the airport. Simply put, incumbents at the airport are largely satisfied with the status quo. While there were mixed opinions about whether any slots should be retired, the vast majority of air carriers opposed any measure that would result in a carrier holding fewer slots under the final rule than it held under the

LaGuardia Order. Of those carriers who were open to reallocation, they tended to support an administrative reallocation mechanism, noting the controversy surrounding the market-based allocation mechanism proposed in the SNPRM.

The Port Authority noted that the FAA has asserted that the proposed measures were designed to address severe delays, preserve consumer choice, maintain airline competiveness and preserve the affordability of airfares. Most commenters agreed, in some form, with the Port Authority's assessment that the proposal achieved none of these objectives. Rather, most commenters noted that the reallocation mechanism did nothing to address congestion and could have the unintended consequence of harming competition and restricting passenger access because of the loss of service to small communities.

United argued that rather than encouraging a market-based allocation method with a robust secondary market, the proposal would have the opposite effect – imposing a new and more market-intrusive regulatory scheme. To the extent there is any market failure at LaGuardia, it posited that failure is a capacity problem that is best remedied by the imposition of a cap.

Not only is the FAA required to ensure the efficient use of the NAS, but it must do so in a manner that does not penalize all potential operators at the airport by effectively shutting them out of the market. The FAA cannot simply walk away from an airport once it has imposed caps, but rather should take steps to ensure that there are, in fact, competitive market forces and actual and potential competition. Competition at an airport benefits the flying public by providing price competition and expanded service. The ability of carriers to initiate or expand service at the airport is hindered, in large part,

by the imposition of the cap. Accordingly, the FAA believes it must strike a balance between (1) promoting competition and permitting access to new entrants and (2) recognizing historical investments in the airport and the need to provide continuity. It is not the role of the Government either to dictate particular business models or to constrain a market and provide no means for others to enter that limited market.

The FAA believes that it is well within the agency's authority in 49 U.S.C. § 40103 to provide some mechanism for reallocation. As was the case with the HDR, the LaGuardia Order provides for a lottery of new and returned capacity but does not provide for the reallocation of capacity that is actively being used. The FAA believes this allocation method may be justified as a short-term measure, but it is inadequate for any cap intended to last for more than a couple of years. Indeed, Congress appears to have shared similar concerns when it allowed for slot exemptions in AIR-21. Today's proposal attempts to strike the appropriate balance by actively developing a robust secondary market that properly values the limited asset that the FAA created.

1. Proposed options

The FAA proposed two different options for allocating slots in the SNPRM. Under both options the vast majority of slots would have been grandfathered to existing carriers at the airport, with a relatively small minority either retired or auctioned off in the free market. Both options allowed for a carrier base of operations for which up to 20 slots would be automatically allocated to the carrier as Common Slots. These slots would not count toward the calculation of slots that would revert to the FAA for retirement or reallocation.

Under Option 1, ten percent of a carrier's Operating Authorizations above its base of operations would revert to the FAA over a five-year period. The FAA proposed that eight percent would be used for reallocation and two percent would be retired for delay mitigation. The FAA also noted that the amount of delay mitigation with a two percent retirement rate may be too low to adequately address congestion and noted that it may increase that number. The monies collected under an auction of reallocated slots would be utilized by the FAA for delay-mitigation efforts in the New York metropolitan area. Some of these efforts could involve a number of initiatives identified by the NYARC as measures that could reduce congestion in the area.

Under Option 2, 20 percent of a carrier's Operating Authorizations above its base of operations would revert to the FAA over five years. All twenty percent would be reallocated, but the carrier would retain the net proceeds, rather than the FAA. The carrier initially allocated the slot would be unable to bid on the slot because it could bid unreasonably high amounts in order to keep out competitors, knowing that the money would come back to it as auction proceeds.

The FAA continues to believe that under either option a sufficient number of slots would be available for reallocation to permit access to the airport and establish a fair market value for slots that could then translate into a robust secondary market. While Option 2 allowed for an even greater number of available slots, it also had the potential to prevent the most interested carrier, i.e., the one initially allocated the slot, from bidding on it. While the FAA anticipated that a carrier could obtain a comparable slot, either through the FAA auction or on the secondary market, there was no guarantee that would happen. This concern was raised by several commenters who noted that the inability for

the carrier to bid on its previously held slots is even more troubling because that carrier may have the greatest incentive to retain the slot based on established service. Several commenters, including the ATA, Delta and US Airways, suggested that the FAA should not limit the number of bidders and possibly the most interested bidder.

Several commenters questioned why ten percent of slots would have expired under Option 1 but 20 percent of slots would have expired for reallocation under Option 2. Specifically, ATA commented that if the FAA believes that ten percent of slots are enough to create a secondary market, then why did it propose Option 2? Additionally, Delta suggested that selecting twenty percent of slots in Option 2 is arbitrary and cannot be reconciled with the selection of ten percent of slots in Option 1.

Unique among the commenters was United, who argued that Option 1 was particularly unfair because the carrier initially holding the slot would not be entitled to receive any compensation for its loss.

As noted above, the FAA believes either approach would help stimulate a secondary market and would lead to a proper assessment of the slots' true value. The agency also believes that either approach would have a minimal impact on operations at the airport and would avoid much of the potential disruption associated with its proposals in the NPRM. However, the agency is persuaded that Option 1 maximizes the efficiency of the slot because the carrier who may value it the most may be the one who held it initially. The FAA has decided to adopt the first option, except that it will retire five percent of the airport's capacity by lowering the hourly cap for scheduled operations to 71. The rule also provides for the reversion of approximately ten percent of the total number of slots currently at the airport to provide access.

2. Categories of slots

Under today's rule, the FAA will lease property interests in slots to carriers for a period of up to ten years, the date the rule sunsets. There will be three categories of slots: Common Slots, Unrestricted Slots, and Limited Slots.

Common Slots are those slots grandfathered to carriers currently at the airport. They will be awarded to the carriers under a cooperative agreement for the duration of the rule. The cooperative agreement will provide carriers with a ten-year leasehold interest. Once the rule sunsets, all interests will revert to the FAA. Unlike slots allocated under the HDR and Operating Authorizations allocated under the LaGuardia Order, carriers will be granted clear property rights to Common Slots, which could be collateralized or subleased to another carrier for consideration. These property rights, however, will not be absolute. Common Slots will be subject to reversion to the FAA under the rule's minimum usage provision, may be temporarily withdrawn for operational reasons, and could be subject to retirement should the FAA need to further reduce the cap.

Those slots not categorized as Common Slots will be categorized initially as Limited Slots and then as Unrestricted Slots once they are reallocated.

Unrestricted Slots are slots that a carrier would acquire as a leasehold. Unlike slots allocated under a cooperative agreement, these slots will require monetary consideration to the FAA. Since a carrier leasing an Unrestricted Slot will be required to do so because of government action, these slots will not be withdrawn by the FAA under the use-or-lose provisions, for operational reasons, or to further reduce the cap should

such reductions be necessary. As with Common Slots, Unrestricted Slots will expire when the rule sunsets.

Limited Slots are slots that are identified for retirement or auction. Those Limited Slots identified for auction will be leased to the carriers under a cooperative agreement for a period of 1-4 years[26] so that they can be reallocated after that period of time. Limited Slots will convert to Unrestricted Slots after they are reallocated. As with Common Slots, Limited Slots may be withdrawn under the proposed use-or-lose provision, or for operational reasons. Because they are already awarded for less than five years, they will not be used to reduce capacity should additional reductions to the cap be necessary.

3. Initial allocation of slots

No later than this rule's effective date, the FAA will notify all carriers which slots they will initially be allocated under the rule. The FAA will make this determination based on slots usage of the underlying Operating Authorizations the week of September 28 through October 4, 2008. The FAA proposed in the NPRM to make this determination based on operations the first full week of 2007, but believes the later date better assesses the operating status of carriers now. One carrier that held Operating Authorizations in January 2007 is no longer in business, although it continues to hold an air carrier certificate. While those Operating Authorizations are currently being operated by another carrier solely within its marketing control, the FAA believes it is simply cleaner to allocate the slots to the holder of the Operating Authorization only if the carrier

[26] Twenty percent of the Limited Slots that will be reallocated will not be leased to carriers as Limited Slots. This is because the FAA intends to auction them as Unrestricted Slots shortly after the final rule takes effect. Likewise, the Limited Slots scheduled for retirement will not be leased to carriers, although the carrier will be entitled to use the slot until March 8, 2009.

is still operating at the airport. Likewise, some Operating Authorizations have been or may be returned to the FAA under the LaGuardia Order's use-or-lose provisions and will not be allocated to the carrier that held them nearly two years ago.

Upon the rule's effective date, each carrier at LaGuardia will automatically be awarded up to 20 Common Slots, which will constitute the carrier's base of operations. The FAA believes this is a rational approach to assuring that no carrier is impacted at a level that could seriously disrupt its existing operations. Air Canada will be awarded an additional 22 Common Slots because of the United States' international obligations with Canada. Eighty-five percent of the remaining slots will also be grandfathered as Common Slots to the carrier holding the corresponding Operating Authorization under the LaGuardia Order. The FAA has decided to grandfather the majority of slots at the airport in order to minimize disruption and to recognize the carriers' historical investments in both the airport and the community.

As noted above, the remaining slots will be categorized as Limited Slots. Approximately one third of the Limited Slots will be retired by the FAA on March 8, 2009, the beginning of the 2009 Summer Scheduling Season. The remaining Limited Slots will be reallocated via auction over a five-year period. The number of slots that a particular carrier will have classified as Limited Slots is based proportionally on the carrier's presence at the airport, taking into consideration each carrier's base of operations. The FAA will inform all carriers that will be awarded Limited Slots how many Limited Slots they will have no later than the rule's effective date.

An affected carrier will have ten days to identify 50 percent of the total number of Limited Slots. During the following ten days, the FAA will determine through a

randomized process the remainder of slots that will be categorized as Limited Slots, taking into account the need to retire some slots at every hour and the need to have capacity available for reallocation throughout the day.

In determining which slots should be designated as Limited Slots, the FAA will initially exclude from consideration slots held during all hours where carriers have collectively determined five or more slots should be Limited Slots.[27] This approach will assure slots will be available for auction throughout the day. The FAA will also determine in what year (0-4) each Limited Slot will revert to the FAA for reallocation and which slots will be retired. In this way, all carriers will know within 20 days of the rule's effective date what slots will become available for purchase and when.

The time windows for the Limited Slots will be evenly distributed over the day to the extent possible. The duration of each Limited Slot will be assigned by a fair allocation process such that each affected carrier's aggregate lease duration will be approximately equal to that of the other affected carriers.

Although most stakeholders are opposed to any slots being withdrawn and auctioned, two respondents thought the auction proposals might be too restricted or limited. The National Air Carrier Association supported encouraging more competition at LaGuardia but questioned whether a sufficient number of slots will be available for auction to result in more competition. The Federal Trade Commission suggested that the ability for auctions to improve allocative efficiency at LaGuardia is limited by the small number of slots being auctioned. Additionally, the Federal Trade Commission is

[27] In the SNPRM, the FAA had proposed that it would initially exclude hours where carriers had collectively identified two slots as Limited Slots. Since generally four slots will be retired in every hour, the FAA believes it is appropriate to increase that number from two to five.

concerned that the few slots that are available for auction are biased towards the least valuable slots. The FAA believes the fair allocation methodology resolves that concern.

The FAA recognizes that the overall number of slots that will be auctioned is relatively small, particularly when compared to its original proposal to reallocate ten percent of the airport's total capacity every year. Such an approach would not only have assured access to the airport, but would arguably maximize the efficiency of the system, assuming no other constraints. However, as discussed in the SNPRM, the carriers would in fact face other constraints. Based on the comments of the Port Authority to the original proposal, the largest constraint could be the ability of the Port Authority to handle its facility as airport proprietor.

The ATA claimed that carriers need to know which of its slots are Limited Slots 90 days before the effective date of the rule in order to be compliant with the rule on the effective date. While the rule becomes effective on [60 days after publication date], carriers can continue their operations without change until March 8, 2009, the first day of the summer scheduling season. Accordingly, the FAA believes carriers will have no problems setting a compliant schedule well in advance of the summer scheduling season.

4. Retirement of slots

In the NPRM and SNPRM, the FAA proposed to cap weekday and Sunday afternoon operations at 81 per hour (75 for scheduled operations and six for general aviation). The airport is already capped under the LaGuardia Order at 78 (75 for scheduled operations and three for unscheduled operations). This rule replaces that Order, although carriers will be allowed to use the slots held under the Order until March 8, 2009. On that day, the cap on scheduled operations will decrease to 71 per hour. This

represents a five percent reduction in capacity at the airport. Based on the modeled results, lowering the hourly cap from 75 to 71 could reduce mean delays by approximately 41 percent compared to modeled delays in August 2007. The FAA selected the new cap of 71 hourly scheduled operations because delays begin to increase sharply after that level of sustained demand. The hourly reductions will not result in eliminating all delay at the airport, especially when operating conditions, such as adverse weather, reduce capacity. However, congestion-related delays are expected to be measurably reduced.

The FAA does not intend to raise the new cap unless conditions at the airport improve sufficiently to permit additional operations without undue delay. The FAA also specifically reserves the right to further lower the cap should operations at the airport remain unduly delayed. The FAA anticipates it would call for a Schedule Reduction Meeting should further reductions be warranted. In any case, the FAA would fully meet its obligations under the APA at that time, and this rule does not provide a means for further cap reductions absent subsequent action on the part of the agency.

The Port Authority claimed in response to the NPRM that 75 scheduled operations per hour are too high; American Airlines echoed this concern in its comments on the SNPRM. United argued against retiring any existing slots. It claimed that any reduction in the number of slots is contrary to market efficiencies because it would eliminate an economically valuable asset.

The ATA argued that the FAA provided no justification for lowering the cap: if the FAA believes there is a need to reduce capacity below the cap, the need would exist regardless of allocation mechanism and should be fully explained. Many of the

commenters also argued that the SNPRM results in almost no reduction in delays, with average delays reduced by less than one minute.

American Airlines supported an overall reduction in the existing cap at the airport, noting that delays were too high. It also supported a flexible system to raise the cap if sufficient improvements are made to the airspace. United, on the other hand, was critical of the FAA's proposal to increase the cap when greater efficiencies in the airspace are realized and suggested the agency instead engage in rulemaking prior to increasing the cap. The ATA agreed with United that the FAA should not raise the cap without seeking input from stakeholders. United also linked the proposal to increase the cap with the proposed auction mechanism.

The FAA recognizes that both the NPRM and SNPRM primarily focused on the efficient allocation of slots and did not propose to significantly reduce delay from levels established under the HDR after AIR-21 and the LaGuardia Order. Even under Option 1, the level of delay mitigation would have been minimal, with only 18 slots retired after five years. The agency estimated that at the end of the scheduled retirements, the average minutes of delay would be reduced by approximately one minute as the result of scheduled retirements. The FAA specifically noted in the SNPRM that reducing the cap could be the best way to address delay mitigation. Accordingly, the agency specifically requested comment as to whether it should reduce the maximum number of scheduled operations from 75 to a lower number. In addition, the agency sought comment on whether it should maintain a maximum number of scheduled operations at 75 per hour but increase the number of slots that would be retired. Finally, there are a few hours

where there are slightly fewer than 75 scheduled operations. The FAA sought comment on whether these slots should be retired or reallocated via an auction.

The FAA has decided that the cap at LaGuardia is too high and the type of reductions anticipated under proposed Option 1 were too low, and would be achieved over too long a period of time, to be meaningful. Prior to the implementation of AIR-21, scheduled hourly operations at the airport were limited by the HDR to 62. While the FAA does not believe the delay modeling currently justifies a reduction to these levels, it does believe the modeling justifies a greater reduction than proposed in the SNPRM. Based on the same modeling technique used to determine the appropriate cap at JFK and Chicago O'Hare International Airport in Schedule Reduction Meetings addressing those airports, the FAA has determined that the appropriate cap on scheduled operations at LaGuardia is 71.

In the SNPRM, the FAA proposed to randomly select operations in excess of 75 in those hours where there are more than 75 scheduled operations. These operations would have been designated as Limited Slots and would have been retired, so that there are no hours where there are more than 75 scheduled operations. The FAA has decided there is no need to treat these slots differently from the other slots that are retired to reduce the hourly cap on operations. Rather, the impact of reducing the hourly cap is that, for these two hours, five or six slots will be retired rather than four.

5. Market-based reallocation of slots

As discussed earlier, the FAA proposed two separate options for reallocating slots at LaGuardia. The FAA has decided to adopt a modified version of Option 1. The commenters have largely combined the two goals of this rulemaking, to address

congestion and to provide for a more equitable and efficient allocation of capacity, into a single goal. Many commenters, including the ATA, United and American Airlines, said that it is the cap on hourly operations and not auctions that will reduce delays at LaGuardia. Furthermore, they contended that the cap and the auction are distinct proposals, with distinct costs and benefits; while a cap may reduce delays, an auction will merely add costs to carriers.

US Airways claimed that the FAA is more interested in experimenting with auctions at LaGuardia than improving congestion and delays. Similarly, American Airlines said that the level of competition in the New York market appears to be the FAA's greatest concern rather than the amount of congestion. According to American Airlines, although the New York-area airports are some of the most competitive, the SNPRM suggests nothing that would reduce congestion and delays.

The ATA claimed that the only congestion-related measure included in this proposal is the cap on operations, which is already in place under the LaGuardia Order and the retirement of a small number of slots. It also argued that the FAA has not articulated how its auctions will translate into delay mitigation or why the high costs of auctions are worth the burden and risk.

The FAA fully agrees that the reallocation method, regardless of what it is, will not have a direct impact on controlling delays. That type of control is achieved by extending the cap beyond the LaGuardia Order, which was never intended to be anything more than a bridge between the HDR and a final rule. While some commenters have argued that it is unreasonable for the FAA to even contemplate a situation in which LaGuardia is unconstrained, that is exactly the result that the expiration of the HDR,

without further regulatory action, achieves. Because the FAA will now be reducing the size of the cap, the delay reduction will be even more significant. The FAA believes that the reallocation mechanism may lead to an air transportation system that is more efficient for the travelling public, even though that mechanism does not reduce the number of aircraft flying in and out of the airport. It is possible that carriers may decide, at least on some routes, to increase the size of the aircraft they are using. While nothing in today's rule dictates this result, it is certainly at least generally foreseeable.

While most of the carriers were categorically opposed to a market-based reallocation mechanism, that opposition was not universal. The FTC argued in favor of an auction mechanism, recognizing the value associated with providing a carrier with a direct financial incentive to maximize the value of a slot.

The FAA has decided to finalize its proposal because it believes that a market-based mechanism such as an auction is the best way to assure that this scarce resource is allocated to the user who values it the most. As a steward of public property, the FAA has an obligation to strive toward getting the best value for that property. Other Federal agencies have used auctions to determine who values Federal property the highest. In addition, a number of papers regarding the societal value of allocating slots via an auction have been published over the past several years,[28] and the FAA finds the arguments made in favor of auctions in those papers compelling. Simply put, a carrier who is required to purchase a slot, will value it more highly than a carrier who received the slot at no cost. Accordingly, the carrier will ensure the slot's best economic use, i.e., putting it to the use

[28] Cf., DotEcon Ltd., *Auctioning Airport Slots- a Report for HM Treasury and the Department of the Environment, Transport and the Regions*, April 2001; Whalen and Carlton, *Economic Analysis Group Discussion Paper – Proposal for a Market-Based Solution to Airport Delays*, October 2007; Brueckner, *Slot-Based Approaches to Airport Congestion Management*, May 2008.

valued most highly by the traveling public. If the carrier cannot profitably use the slot, it will presumably sublease the slot to another carrier who can maximize its efficient use. In addition, a carrier wishing to gain a presence at an airport can purchase the lease from the government directly rather than attempting to obtain slots solely from its competitors, increasing competition at the airport.

The value associated with allocating a scarce government resource via an auction was also recognized by Congress in the telecommunications context when it passed the Licensing Improvement Act of 1993. In the section-by-section analysis of the statute, the committee report specifically references promotion of efficient and intensive use of the electromagnetic spectrum as one of the objectives the committee believed the new legislation would achieve. 1993 USCCAN at 580.

As noted earlier, the agency's own experiences with slot-controlled airports under the HDR are consistent with the observations made in the literature. Under the Buy/Sell Rule, carriers wishing to enter the market complained they were unable to gain market-share, and the underutilization of those slots allocated to the carriers at no cost forced the agency to impose a usage requirement.

The auction process contemplated by today's rule will guarantee carriers wishing to initiate or extend operations at the airport an opportunity to acquire slots. In January 2009 there will be at least 24 slots available in the auction. In the following four years there will be at least 22 slots available.[29] Since carriers need pairs of slots, this is equivalent to 11 to 12 round-trips per day. Assuming a minimum competitive pattern of service is between two and three round-trips per day, the equivalent of four to five routes

[29] The agency anticipates that there may be additional slots available for auction because of returned or unallocated capacity.

would be available per year. Carriers would be free to supplement their holdings in the secondary market, which the agency believes will be stimulated by this rule.

The FAA intends to auction off 20 percent of the Limited Slots that are not retired annually. Any carrier may bid on the slot, and it will be awarded to the highest responsive bidder. The winning parties may commence operations using the newly acquired slots on the second Sunday of the following March. In the unlikely event no bids are received, the FAA will retire the slot until the next auction. Allowing the carrier holding the Limited Slot to retain it, as suggested by some commenters, could encourage the carrier to simply not bid on the slot. The FAA will retain all auction proceeds. After recouping its costs, the FAA intends to spend the remainder of the proceeds on congestion and delay management initiatives in the New York City area. The FAA has already established a receipt account for these proceeds.

The FAA will not reallocate slots after the first five years (other than those returned under the rule's use-or-lose provisions) because it believes that ideally slots should transfer from one carrier to another through the secondary market. The FAA has decided to be involved in a limited number of slot transactions during the first five years of the rule to help establish that market. Not only will the auctions help create a market for slots, but all carriers will be able to assess the true market value of a slot. Armed with information on how much a given slot is likely to be worth on the open market, carriers (and their shareholders) will be in a better position to determine whether to continue operating marginally-performing flights or to sublease the corresponding slot.

The FAA believes that merely relying on the secondary market to accurately establish the value of slots, as some commenters have suggested, is problematic. A

fundamental problem with the secondary market cannot be addressed without first addressing the primary market. Incumbents have significant incentives not to sell or lease out slots to airlines that will compete with their networks to a substantial degree. Thus, incumbents rationally foreclose entry both to other incumbents and to new entrants. One of our objectives in this rule is to change those incentives and reduce the likelihood that incumbents can foreclose entry and potential competition indefinitely.

In addition, in the secondary market a carrier may rely on tangible assets that do not have the same monetary value for all carriers or even non-tangible assets, such as goodwill or a pre-existing relationship, when evaluating whether to lease a slot. Thus, while the slot may have a real value for the carriers engaged in the negotiations, that value cannot be translated into a "fair market value" that can be relied on throughout the industry as a reasonable valuation of the slot. The agency believes that it should not take more than five years for a robust secondary market to develop.

Given the physical constraints at the airport and the carriers' ability to sublease slots if the operations associated with the slots are not financially productive, the FAA anticipates that there will be little new or returned capacity for most of the time the rule is in effect. With the advent of NextGen technology, there may be new capacity in the later years of the rule. To the extent there is any new or returned capacity, the FAA intends to auction off that capacity, and will categorize the slots as Unrestricted Slots.[30]

a. Network effects of auctions

The potential for auctions to have adverse network effects was a concern for many stakeholders. The Federal Trade Commission noted that network effects are likely

[30] If any slots were not bid on in the final year of the annual auction, the FAA would retire those slots until it reallocated new or returned capacity. The agency does not yet know if enough new or returned capacity would be available to justify an annual reallocation.

to be complex since the worth of one particular flight is dependent on other flights. Accordingly, the Federal Trade Commission cautioned that auctions at LaGuardia might not lead to an efficient outcome.

US Airways noted that the network and route systems of airlines required substantial investments and many years to build. Carriers rely on routes from smaller cities to provide passengers to their hubs at airports such as LaGuardia. This structure, according to US Airways, is at risk should the FAA complete its rulemaking as proposed in the SNPRM. US Airways also objected to the possibility that a carrier could lose slots that are important feeder flights into its hub at LaGuardia. Furthermore, according to US Airways, the loss of just a few passengers could jeopardize service to some smaller markets.

United Airlines commented that slots are essential to allow airlines to provide flights between LaGuardia and other cities and the carrier may even be forced to discontinue service to some communities because of the loss of slots. The ATA added that some carriers have made large investments in their schedules with the expectation that they will be able to continue serving LaGuardia and that these schedules will compliment their other daily operations.

The FAA recognizes that any reallocation of slots through an auction, or any other allocation mechanism, can affect the network structure of an airline. We are also aware that several carriers at the airport have made investments in the infrastructure at LaGuardia based on their previous slot holdings under the HDR. However, when Congress phased out the HDR as part of AIR-21, it was clear to all stakeholders that slots and slot allocations under that rule would no longer exist as of January 2007.

In an effort to ensure a smooth transition between the expiration of the HDR and a new allocative regime, the FAA grandfathered use of all slots to carriers on a temporary basis. This final rule will continue to allocate a majority of slots to the incumbent slot holders.

To the extent that a carrier's Limited Slot reverts to the FAA, there is nothing in this rule that precludes that carrier from bidding in the auctions to acquire the same or a comparable slot for the purpose of maintaining the status quo. Similarly, we believe the rule will promote a robust secondary market, which will provide further opportunity for carriers to acquire slots to satisfy their network needs.

b. Impact of auctions on competition

The SNPRM assumed that auctions will lead to efficient airline behavior. The Port Authority opinion differs. The Port Authority commented that auctions may exacerbate anti-competitive conditions, which would lead to reduced opportunities for new entrant and limited incumbent airlines to enter the airport. They claimed that the large incumbent carriers with the majority of slots at LaGuardia could use their relatively stronger balance sheets to outbid the smaller, non-legacy airlines that help stimulate competition. The Air Carrier Association of America's (ACAA) comments echo this concern.

According to the Port Authority and the ACAA, the SNPRM provides the legacy incumbent carriers the incentive to bid prices beyond the level carriers with a limited presence at the airport can afford, then trade the slots they win among themselves to maintain their current schedules. The result could be a significant increase in airfares and a decrease in the number of destinations served.

Offering a different view, US Airways commented that there is already significant competition at LaGuardia, and new entrants have more the 50 daily roundtrips from this airport. US Airways also suggested that competition from new entrants at LaGuardia has helped moderate fares for the New York City region. It also asserted that there is no evidence that new entrants cannot enter the market, or that the reallocation proposal would address that concern even if it were valid.

Unlike most of the commenters, the ACAA was not opposed to the consideration of auctions. However, it believes that too many questions exist about auctions as a method to promote competition for this proposal to move forward. The ACAA was primarily concerned with providing low-cost carriers access to entry in LaGuardia, particularly now that all three of the major New York metro airports are capped.

US Airways argued that the 20-slot base of operations is clearly designed to protect new entrant carriers at the expense of other carriers and ignores the fact that these new entrants already have a significant presence both at LaGuardia and in the New York metropolitan area as a whole. The FAA notes that the base of operations was intentionally designed to promote at least some competition at the airport by ensuring limited incumbents retain the opportunity to serve the airport. However, this degree of competition, when viewed in the context of the total number of operations at the airport, negatively impacts no one. Thus, the FAA finds US Airways' argument that the 20-slot base of operations is detrimental to carriers who have a larger presence at the airport is disingenuous. All carriers, regardless of the size of their operations at the airport, are entitled to the base of operations. For slots above this level, Limited Slots are assigned on a proportional basis, so that larger carriers will have more Limited Slots only because

they will be grandfathered a greater number of total slots at the airport. In addition, while the base of operations provision protects up to 20 slots per carrier, it does not allow a carrier with fewer than 20 operations to increase their holdings unless they are willing to lease them from another carrier or participate in an auction.

The FAA disagrees with the assertion that the limited number of auctions contemplated in this rule will reduce competition at the airport. The HDR, in place at LaGuardia airport for decades, was criticized for not providing sufficient opportunity for new entrant or limited incumbent carriers to enter or expand service at the airport. We believe there is merit to these criticisms.

To encourage greater competition and expand opportunities for entry at the airport, the FAA intends to reallocate by auction a portion of existing slots from those carriers who held the majority of slots under the HDR. The auction is designed to provide greater competition at the airport because it uses the market to reallocate limited resources to those who value the asset most.

We understand the concerns of some persons that carriers may attempt to use Unrestricted Slots which are not subject to a usage requirement to monopolize operations at an airport. The Department has the authority to ensure that carriers do not use their ability to permit such slots to remain idle to unlawfully restrict competition. The Department's mandate under 49 U.S.C. § 41712 to prohibit unfair methods of competition authorizes it to stop carriers from engaging in conduct that can be characterized as anticompetitive under antitrust principles. If the Department is presented with clear and convincing evidence that a carrier is hoarding slots to monopolize operations at an airport it will pursue enforcement action against the carrier.

c. Alternatives to reallocation

The Port Authority commented that a notice of proposed rulemaking that solicits comment on a single solution when other significant solutions have been recently proposed is inherently flawed. It noted the NYARC, through working group 5, evaluated the use of the IATA Worldwide Scheduling Guidelines (WSG) but that approach was not even referred to in the SNPRM, despite near unanimous support among NYARC members for that alternative. American Airlines similarly suggested the FAA adopt the WSG under a slot rule addressing all three New York metropolitan airports rather than relying on auctions to reallocate capacity. Delta also suggested that the FAA take steps to improve the secondary market in conjunction with the existing Order before adopting a final rule based on the SNPRM. Echoing Delta's sentiment, US Airways suggested the buy/sell mechanisms implemented under the HDR could be improved or modified to address concerns about competition.

Many stakeholders said that the FAA should use other approaches instead of auctions to reduce delays at LaGuardia. In particular, the FAA should focus on implementing operational procedures and investments to enhance capacity. The American Association of Airport Executives said that the FAA should proceed with implementing ADS-B and other air traffic control technologies. The Regional Airline Association said that rather than auctioning slots, the FAA should focus on completing NextGen. Similarly, the ATA suggests that the FAA continue to implement the 77 New York Aviation Rulemaking Committee improvements and continue implementing NextGen.

Delta suggested several alternatives to addressing a perceived inability to access the market. Even though it did not support any of the alternatives, it suggested they were both legal and less disruptive than the proposal. While some of the ideas associated with improving the transparency of the secondary market have already been proposed by the FAA and are incorporated in today's rule, Delta also suggested that all transactions in the secondary market could be negotiated via an FAA-managed auction or that a carrier be required to place a set number of slots up for auction, but be allowed to set a reserve price. The ATA suggested the agency adopt a slightly modified version of the existing Order and have the FAA act as a clearing-house for the secondary market, but impose no constraints on the transactions.

The ACAA argued that some reallocation mechanism other than an auction should be provided since all three major New York metropolitan area airports are capped. It noted that there should be some slots available to limited incumbents because the larger carriers are drawing down service and exploring merger possibilities. The FAA has historically provided for the administrative allocation of slots. We could have proposed such an approach in this rulemaking. However, the auction allows the market to allocate resources, which is the standard way virtually all resources are allocated in the US economy.

The WSG approach has never been used at a domestic airport like LaGuardia. While the FAA could adopt a domestic equivalent of the WSG, the FAA has decided against this approach because, like the lottery provisions of the HDR, it does not provide for a sufficient amount of capacity available for reallocation to stimulate the secondary market. The ATA is correct that many of the members of the ARC working group five

supported using the WSG at LaGuardia. However, several carriers not on the working group were opposed to that approach and some of their concerns are included in the NYARC report.

As to the suggestion that the FAA focus on the various technological and physical improvements identified by the NYARC, many of these initiatives are already underway. However, we do not believe that they will address the congestion issues at LaGuardia sufficiently to merit lifting the cap on operations. It is the cap that creates the need for reallocation.

Finally, as to the suggestions that the FAA leave the LaGuardia Order in place but make improvements to the secondary market, the FAA has already implemented several changes to the existing provisions controlling the secondary market in this rule.

B. Secondary trading

All slots will have value in the secondary market. To the extent that the secondary market is not mature and the value of slots is not well-known, the auction should inform potential buyers of the value of these slots and stimulate the secondary market. The FAA believes that ultimately the best way to maximize competition is with the development of a robust secondary market. To that end, the agency did not propose a system of set-asides and exemptions that would be available to new entrants and limited incumbents.

We believe some measures must be taken to assure access to the secondary market. The system of preferences and exemptions developed under the HDR and AIR-21 may have significantly diluted the viability of the secondary market ostensibly created under the HDR's Buy/Sell Rule as several commenters claim, but we do not believe that

was the sole culprit. The Buy/Sell Rule permitted transactions that were never advertised and the terms of which were never monitored for anti-competitive behavior.

We believe all carriers interested in initiating operations at LaGuardia, or increasing their operations there, should have an opportunity to participate in any transactions. Accordingly, the FAA will permit carriers to include Common Slots for sale in the auction organized by the FAA. If a carrier wishes to include some of its Common Slots in the auction, these slots will be treated in the same manner as other slots being auctioned by the FAA. The carrier would be able to specify a minimum price for these slots so that it need not give up the slots unless they command a price that the carrier is willing to accept and it would retain the proceeds.

In addition, the FAA will establish a bulletin-board system whereby carriers seeking to sublet slots outside the auction process, or to acquire such subleases, would notify the FAA, which would then post the relevant information on its website. The FAA has decided that transactions via the bulletin-board-system do not have to be blind, and the transaction may include both cash and non-cash payments.

The ACAA commented that any mechanisms geared toward a secondary market must include a blind sale/transfer allocation system for any proposed sale or lease of slots. Other carriers, including US Airways and American Airlines, noted that the secondary market should be as transparent as possible since even a hybrid system, whereby the lessor would accept the highest cash bid and then negotiate the value of non-monetary assets after the bid was accepted, would close interested lessees out of the transaction.

We continue to have reservations about the adequacy of the value associated with non-monetary assets when the leasing carrier is not a direct competitor versus when the potential lessee competes directly against the carrier offering to lease the slot. However we also believe non-cash transactions should result in both more bidders and potentially higher bids. Since the non-cash aspect of a transaction would require direct negotiating, parties would need to be disclosed.

In order to preclude the type of collusion that appears to have been present, at least some of the time, under the Buy/Sell Rule, the Department will monitor trades on the secondary market. The Department already has the authority under 49 U.S.C. § 41712 to investigate, prohibit, and impose penalties on an air carrier for an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. The Department has consistently held that this authority empowers it to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may do so in the future, or (3) that, although not a violation of the letter of the antitrust laws, is close to a violation or contrary to their spirit.[31]

Today's rule requires carriers to file with the Department a detailed breakdown of all lease terms and asset transfers for each transaction, and the subletting carrier must disclose all bids submitted in response to its solicitation. The requirement is needed so that the Department can adequately monitor the secondary market. The slot may not be

[31] See *United Airlines, Inc. v. Civil Aeronautics Board*, 766 F. 2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; see also H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5, *Order 2002-9-2, Complaint of the American Society of Travel Agents, Inc., and Joseph Galloway against United Air Lines, Inc, et al.* (Docket No. OST-99-6410) and *Complaint of The American Society of Travel Agents, Inc., and Hillside Travel, Inc. against Delta Air Lines, et al.* (Docket No. OST-02-12004) (September 4, 2002) at 22-23.

operated by the acquiring carrier until all documentation has been received, and the FAA has approved the transfer. The approval process is required to assure the FAA has up-to-date information on who is operating the flight. The FAA will not limit its approval based on any substantive provisions in the document. Although the ATA claimed the provisions governing the secondary market are unduly intrusive and chilling, the FAA believes that even in a robust market it needs to track and provide oversight of the market. This oversight will ensure access remains available to all interested parties and the slots are actually being used in the manner represented to the FAA. Since Common and Limited Slots may be transferred in the secondary market, the underlying policy considerations supporting the FAA's decision to award them under a cooperative agreement rather than for monetary consideration remain, even if the operating carrier has changed.

Trades among marketing carriers and one-for-one trades do not have to be advertised. Marketing carriers should not have to open up transactions to the carrier community as a whole any more than a single carrier should have to disclose its scheduling decisions with other carriers. The FAA will approve these transactions, as it has done historically. As is the case with longer-term transfers among different carriers, the FAA only approves the transaction to maintain accurate information on which carrier is operating a particular slot.

Same day trades among marketing carriers that address emergency situations such as maintenance problems or other unforeseen operational issues may take place without prior approval by the FAA, but carriers must notify the FAA of the trade within five business days. One-for-one trades among carriers will not be subject to the restrictions of

the secondary market because they enhance the operational efficiency of the airport. However, the exchange of slots on a one-for-one basis cannot be for consideration, since they would then take on the characteristics of lease agreements negotiated in the secondary market. Nonetheless, carriers must notify the FAA of all such trades so that the agency can maintain accurate information on which carrier is operating a particular slot.

C. Usage requirements

The FAA is adopting the usage requirements proposed in the SNPRM. Specifically, Common and Limited Slots must be used 80 percent of the time over a two-month reporting period unless the FAA waives the usage requirements due to unusual and unforeseeable circumstances beyond the carrier's control. The impact of these events must extend beyond five consecutive days. Unrestricted Slots will not be subject to the usage requirements.

Under this rule each slot will be assigned a corresponding scheduled operation. Carriers will be required to report a series of flights under a single slot number rather than in the aggregate. In this way the FAA will be able to more accurately track a slot's usage with the flight it was scheduled against. Carriers will be permitted to operate a charter, maintenance, or ferry operation in lieu of a scheduled operation and not have that operation discounted as long as they do not abuse the privilege.

Several commenters, including the ATA and the Port Authority, noted that the proposal to exclude Unrestricted Slots from the usage requirement is inconsistent with the current practice of requiring all slots, even those purchased in the secondary market, to be subject to the use-or-lose requirements. These commenters suggested that all slots should

be subject to usage requirements. The Port Authority added that given current market conditions of higher fares, driven by higher fuel costs, there is a possibility that the auction bid prices may be sufficiently low to cause a large incumbent carrier to make low bids for various slots, and then simply not use them as a means of blocking future competition after markets improve from the current depressed condition.

We understand the concerns of some persons that carriers may attempt to use Unrestricted Slots which are not subject to a usage requirement to monopolize operations at an airport. We do not believe this risk is sufficiently large to attach a usage requirement on Unrestricted Slots. One hundred percent of the slots allocated under the HDR and then converted into Operating Authorizations under the LaGuardia Order were initially allocated by the FAA at no cost to the carrier. Because the slots were free, carriers were incentivized to hoard slots in order to keep competitors out, and the FAA was forced to implement a usage requirement. Since the FAA wishes to introduce a market-based means of addressing slot allocation, both initially and in the secondary market, the agency believes the Unrestricted Slot should be just that – unrestricted. The FAA does not believe there is a need to treat all slots equally when they are not all allocated under the same terms and conditions.[32]

The Department has the authority to ensure that carriers do not use their ability to permit such slots to remain idle to unlawfully restrict competition. The Department's mandate under 49 U.S.C. § 41712 to prohibit unfair methods of competition authorizes it to stop carriers from engaging in conduct that can be characterized as anticompetitive under antitrust principles. If the Department is presented with clear and convincing

[32] Unrestricted Slots could potentially have a higher value in the secondary market than Common or Limited Slots because they are not subject to the same restrictions.

evidence that a carrier is hoarding slots to monopolize operations at an airport it will pursue enforcement action against the carrier. In order to assist the Department in determining whether a carrier is engaging in anticompetitive behavior, we are expanding the requirement in the regulatory text to report usage to include Unrestricted Slots as well as Common and Limited Slots. While a carrier would not risk losing an Unrestricted Slot for failure to report, the FAA could take civil enforcement action consistent with its authority to take enforcement action for any violation of a regulatory requirement.

The Port Authority continues to argue, without support, that the usage requirement should be higher than 80 percent. It commented to the SNPRM that it has an interest in maximizing use of its runways. Although it is not reasonable to expect 100 percent utilization, the Port Authority believes that a 90 percent utilization standard, applied against aggregate slot use would assure five-day-per-week use of slots. The Port Authority also proposed that the FAA report data on slot usage at least at the aggregate level. It stated it could use these data to evaluate the relationship of slot usage and the FAA's exercise of authority to enforce the use-or-lose provisions. We have not seen a need to increase the usage requirement beyond 80 percent. The waiver provisions of this rule are quite limited. In addition, the agency has recently demonstrated that it intends to apply these provisions narrowly.[33] The usage requirement is designed to address legitimate problems that arise in the regular course of business and includes flight cancellations due to maintenance problems, poor weather, or missed connections. Given

[33] On July 3, 2008, the FAA denied a request submitted by six air carriers, seeking a waiver of the minimum usage requirements at all US airports that have such requirements as a result of rapidly escalating fuel prices. The FAA's denial of the air carrier's request is available in docket FAA-2008-0656. In addition, on August 6, 2008, the FAA denied a separate request by AirTran Airways for a temporary waiver of the minimum usage requirement at LaGuardia based on the construction-related closure of a jetway that was dedicated to AirTran's operations.

the likelihood that the FAA will not grant a waiver request except under exceptionally tight conditions, a carrier has every incentive to use the slot as much as possible to preserve a cushion for the types of problems it can reasonably expect to encounter. We acknowledge the Port Authority's request to see usage data, but that request does not fall within the ambit of this rulemaking.

Finally, in the SNPRM, the FAA proposed to provide for a 90 day waiver of the usage requirement for common and limited slots acquired by sublease. We have subsequently determined that there is no need for such a provision. The starting date of a sublease is fully within the control of the contracting carriers and can be easily negotiated to address any possible concerns related to starting new service.

D. Unscheduled operations

As proposed in the SNPRM, the FAA is limiting unscheduled operations into and out of LaGuardia during the constrained hours. Historically these operations have been restricted via the LaGuardia Order to six per hour, but the FAA has recently reduced that number to three under the LaGuardia Order. Under today's rule, reservations are required to use the airport (except for emergency operations) and may be obtained up to 72 hours in advance. The reservations will be available on an hourly, rather than half-hourly, basis. This will provide additional flexibility with minimal operational impacts overall.

To the extent Air Traffic Control (ATC) can handle additional requests (for example in good weather), it will do so without regard to the reason for the request. In addition, ATC may decide special circumstances justify an additional flight. However, there is no guarantee that the FAA will accept more than three reservations per hour, and

the determination to handle more traffic would likely be made on that day. Reservations for all non-emergency flights would still be required. The FAA will allow public charter operators to reserve one of the three available allowable operations up to six months in advance. If more than one public charter operation is desired for a given hour, the public charter operator without the advance reservation could attempt to secure a reservation within the three-day window that is available for all other unscheduled operations.

The Aircraft Owners and Pilots Association (AOPA), NetJets and the National Air Transportation Association (NATA) commented that the number of unscheduled arrivals is overly restrictive. According to AOPA, although general aviation is less than four percent of total operations at LaGuardia, the number of unscheduled arrivals is reduced by fifty percent. Similarly, NetJets suggested that although general aviation makes a negligible contribution to congestion in the New York area, the SNPRM has a disproportionate impact on general aviation compared with scheduled carriers. It also asserts that the FAA has not linked the reduction in permitted operations with any delay reduction benefit nor evaluated the potential cost impact on affected businesses. These commenters do not believe an objective analysis of the historical usage rate for unscheduled operations has been provided to justify the proposed decrease and therefore, the FAA may have underestimated the negative effect of a 50 percent reduction in unscheduled operations. The Port Authority claimed the FAA did not look at the proposed reduction in unscheduled services at LaGuardia in light of similar restrictions at JFK and Newark Airports.

Contrary to the Port Authority's assertion, the proposal to reduce unscheduled operations at LaGuardia was generated by the agency's concern on managing operations

within the region. Consistent with this action, the FAA proposed limits for unscheduled operations at JFK and Newark.[34] At these airports, the FAA proposed reductions in the number of unscheduled operations in the most congested hours. The FAA finds it reasonable to limit unscheduled operations at LaGuardia to their 2007 usage levels. In the New York area, the FAA must balance fair and reasonable access against congestion reduction and management goals. To reach these goals, the number of unscheduled operations cannot grow at LaGuardia, JFK or Newark. While permissible unscheduled operations at the airport are reduced by 50 percent, actual operations are reduced little, if at all.

In addition, NATA objected to the proposal to allow public charter carriers to reserve one of the three available hourly slots up to six months in advance, while Part 135 on-demand air carriers will only be able to reserve slots up to 72 hours in advance. NATA believes that passengers on Part 135 on-demand aircraft should have the same ability to pre-plan their arrival and departure times as passengers on scheduled airlines and public charters.

The FAA does not believe that public charter operators and on demand charter operators should be treated similarly. Unlike on demand charters, public charters may not be marketed until prospectuses are filed with the Department and they are marketed to individual consumers long in advance of the dates of operation. Public charters are also generally limited to operating from larger airports. Thus, in the New York area, public charters cannot be operated from many of the local airports, such as Teterboro, that are available to on demand charter flights. For these reasons, we believe public

[34] 73 FR 41156 (July 17, 2008).

charter operators should have a significantly earlier opportunity to obtain slots for their operations under this rule than on demand charters.

Additionally, unscheduled flights produce roughly the same delay costs as scheduled flights at the same time. However, unscheduled flights can be accommodated if operators are flexible in their arrival or departure times. In response to public comment we have assessed the impact on business if unscheduled flights are restricted based upon the FAA's record of actual operations in the agency's Enhanced Traffic Management System for year ended May 31, 2008. The total number of hours where unscheduled operations exceed available slots was 174. The numbers of hour where there was insufficient capacity in the adjacent two hours to handle excess demand was zero. Thus, if an unscheduled flight changes its flight plan slightly, it will be accommodated and this operator would not incur costs.

The ATA commented that helicopters should be subject to this proposal because they also take up valuable air traffic control services. The FAA recognizes that helicopter operations can add to a controller's workload. However, because the FAA did not propose, or even suggest, that helicopters would be covered by this rule, there would have been no reason for helicopter operators to comment on the rule and there is inadequate scope to add them at this time.

E. Sunset provision

This rule will expire in ten years. One of the criticisms of the HDR was that it was a temporary rule that has lasted almost 40 years. As such, it became difficult to manage, particularly as it was amended to address changes in business models. We believe the public interest is better served by directly providing the rule will sunset in ten

years. This approach will allow for future determinations by the FAA as to whether a cap is still needed and, if so, whether changes are needed to more efficiently allocate and constrain the scarce resource. At present it is impossible to determine what changes in business models may occur over the next ten years. In addition, full implementation of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project and NextGen technologies are expected to mitigate and improve air traffic efficiency within the next ten years, and we should not prejudge the market response.

The ATA questioned why this rule is implemented on a temporary basis if the agency believes it represents the best solution for the airport. Additionally, several commenters noted that temporary slot lives reduce the value of slots. They argued the short-term nature of the proposal and the uncertainty of future slot operations at LaGuardia would have a chilling effect on the value given to slots and gates in relation to capital flow and collateralization. Several carriers were concerned that financial institutions would lose confidence in slots as collateral and reduce or eliminate a carrier's ability to fully collateralize the asset.

The FAA is somewhat puzzled by the carriers' assertion that having the rule sunset in ten years is somehow more detrimental to their interests than keeping in place an order whose expiration date is linked to a final rule that could be issued at any time. The FAA believes providing a date certain through which slots will be awarded actually increases the certainty of the holding. The assumption seems to be that regulatory inactivity is the solution to all the carriers' concerns, and that therefore, the FAA should just maintain the LaGuardia Order status quo. This is not an acceptable solution. The LaGuardia Order was issued as a bridge document and was never intended to stay in

place for more than a year or two. Accordingly, the FAA simply froze all operations at the airport under the HDR conditions, except that the carriers are precluded from selling their Operating Authorizations. The Order was not subjected to the type of policy rigor or economic analysis that justifies any rule intended to be more than an initial measure. In addition, the FAA believes it is important for carriers and those who provide financing to realize that slots at a constrained airport are not intended to be a permanent response to solving congestion, with the incumbents being afforded unlimited rights.

F. Other issues

1. Withdrawal for operational need and for future reductions in the cap

The FAA is adopting its proposal to retain the right to temporarily withdraw Limited and Common Slots for operational need. The FAA has historically retained this right, although it has rarely, if ever, been exercised. This provision is included to allow the FAA to immediately address a situation where it cannot handle the usual amount of traffic on a temporary basis. This provision would typically be invoked because of problems with the landside infrastructure, such as a closed runway or terminal, or changes to air traffic control procedures that would result in sustained capacity reductions.

As discussed earlier, the FAA is also retaining the right to further reduce the cap on operations should the Administrator determine that the cap on operations remains too high. For the reasons discussed earlier, this provision is limited to Common Slots.

2. Limit on arrivals and departures

In response to the NPRM, American Airlines and The City of New York suggested the final rule should regulate arrivals only. The FAA explained in the SNPRM

why it continues to believe that the sequencing of flights at LaGuardia is so tight that the FAA does not believe it can merely limit arrivals. American Airlines continues to assert that only constraints on arrivals are needed. Nevertheless, the FAA continues to believe both arrivals and departures should be slot-controlled.

3. Common ownership

The proposal defines "common ownership" as requiring at least 50 percent beneficial ownership or control by the same entity or entities. ATA commented that this definition would not cover many of the network carriers' regional partners as very few have at least a 50 percent beneficial ownership or control of these independent companies. The FAA will treat commonly owned carriers as single entities for determining a carrier's base of operations or whether transfers are appropriate. Independent carriers, such as those cited by the ATA, will each be entitled to a base of operations of up to 20 slots regardless of whether they offer services under their own names or under a code-share agreement with another carrier. Transfer provisions between commonly owned and affiliated carriers receive similar treatment.

4. Impact of the final rule on the Port Authority's ability to run its airport

The ACI-NA and the Port Authority both claim that the proposal to auction slots interferes with the Port Authority's ability to run the airport and constitutes an impermissible infringement on the Port Authority's right to collect revenue for use of the airport facilities. The ACI-NA believes that market-based access issues should remain within the exclusive purview of the airport's proprietor. The Port Authority expressed similar sentiments in its comments to the NPRM suggesting it develop a method of allocation at the airport.

The FAA has never proposed to deny carriers gate access at LaGuardia, nor has it proposed to otherwise address issues associated with the facilities at the airport. The FAA recognizes that the Port Authority bears responsibility for the terminal-side portion of the airport. However, it is the FAA, and not the Port Authority, that has responsibility for managing the airspace. While the Port Authority claims that slot auctions would somehow be disruptive to the airport, it fails to explain how, in terms of making arrangements for gates and other airport facilities, acquiring a slot via an auction is any different from acquiring a slot via the secondary market, or for that matter, via a lottery, as was the case under the HDR.

To the extent public policy goals could arguably be better achieved by an airport proprietor rather than the FAA, the agency notes that this rule provides for no special carve-outs. To the extent an airport could address these policy issues through a market-based, or even administratively-based mechanism, it is free to do so consistent with its grant obligations and any other restrictions imposed by Federal law.

V. Potential loss of service to small communities

Several stakeholders were concerned about the adverse effects of this SNPRM on service to small communities. The ATA noted that at least one destination is served by Essential Air Service (EAS) from LaGuardia. The one EAS community currently with service to LaGuardia (Lebanon, New Hampshire) will receive service to a new hub airport in another city as of November 4, 2008.

Several carriers, their associations and ACI-NA commented that if carriers prioritize which service to continue, it is likely that carriers will continue the most profitable routes, the dense routes connecting to large markets, and drop service to

smaller markets. Commenters argued that both the provision that Limited Slots revert to the FAA and the market-based allocation of Unrestricted Slots would result in a loss of small community service.

United noted that the "confiscation" of slots would lead to carriers eliminating flights, most likely to smaller communities. It claimed the argument in the initial regulatory evaluation that carriers would keep these flights because they are currently profitable is flawed; faced with a reduction in the overall number of flights, which could only be recouped at a cost, carriers will reprioritize its current interests and will likely drop service to smaller communities.

US Airways also remarked that the SNPRM proposed a form of a 'forced upgauging' on LaGuardia and that will almost inevitably lead to diminished service to small and medium-sized markets. US Airways went on to state that this loss of service would be exacerbated by the auctioning of slots at other New York area airports. The commenter argued that the auction could end up actually increasing system-wide congestion because there would be more flights between LaGuardia and other airports that are already congested because the service to smaller, non-congested airports would no longer make sense economically.

Several commenters noted that service to small communities is provided on smaller aircraft. The Port Authority estimated that with auctions, the cost per seat for carriers could be from two to six times higher for small aircraft. The Regional Airline Association commented that many communities are served exclusively by small regional aircraft and that it is only through these smaller planes that there can be any meaningful competition in smaller communities.

Both the Port Authority and the American Association of Airport Executives raised concerns about the potential impact to communities within 300 miles of New York City. These commenters noted that alternative hubs are not a realistic option for cities within a 300 mile radius of LaGuardia; and the Port Authority noted that service to these communities has already declined 14 percent in the past year. They also noted that the concern that a particular community could lose existing service to LaGuardia was raised by several smaller municipalities and their community organizations in response to the NPRM. In particular, the Port Authority noted the assessment by Newport News/Williamsburg International Airport that the loss of one third of AirTran's service to the community could result in the loss of approximately $20 billion per year to the region.

Finally, NetJets commented that limiting unscheduled operations will also negatively impact small communities. According to NetJets, many of the smallest markets have no commercial air service to the New York City area and general aviation is the only air link to the region. Additionally, NetJets noted that general aviation is going to become more important for service to New York City as scheduled carriers reduce the reach of their networks because of high fuel prices.

While not directly related to the loss of service to small communities, the Canadian Airports Council expressed concern that air service to Canada would be jeopardized because the major Canadian cities are much smaller than their U.S. counterparts and cannot sustain larger aircraft.

The FAA recognizes that there is a significant level of small community service at LaGuardia. We believe small community service is an important sector of aviation. The

FAA has made several changes to its original proposal to address the potential loss of services. Not only did the agency withdraw the requirement for aircraft upgauging at LaGuardia, but it also reduced the number of slots that would be reallocated from 100 percent of slots every ten years to 10 percent of slots in the first five years, with no reallocation thereafter. The SNPRM did not provide any carve-outs for small community service like the upgauging proposal of the NPRM, and we do not adopt any today. The agency continues to believe that a system whereby upgauging to larger aircraft is completely voluntary decreases the likelihood of a whole-sale withdrawal from smaller markets.

We note that the AIR-21 exemptions from the HDR, which permitted additional flights by new entrant carriers and by carriers serving small hub and non-hub airports with smaller aircraft have expired. Until the spring/summer of 2008, when the cost of oil reached unprecedented levels, we had not seen a reduction in service to small communities under the LaGuardia Order, which allows commercial decisions by the carriers and does not classify Operating Authorizations by class of user. Therefore, although there may be a slight reduction small community service by not dedicating slots for those particular cities, we believe market conditions and fuel prices are the primary motivation for any reduction in service, and not a consequence of federal action in this rule.

Furthermore, several air carriers have noted in public fora that service to small communities from LaGuardia is profitable and an important part of their network operations. Due to these facts, and the Administration's decision to rely on the market to allocate slots according to their highest and best use, we do not believe it is appropriate to

develop a separate class of slots specifically for use to and from small communities. The FAA wishes to avoid any unintended consequences on a carrier's marketing and network decisions that could result from set asides or exemptions for small communities.

The FAA acknowledges the Canadian Airports Council's concern about service to smaller sized Canadian cities. However, Air Canada will be allocated 42 common slots because of the United States' bilateral obligations with Canada. Consequently, Air Canada, the only Canadian carrier currently serving LaGuardia, will have continued access to the slots they have historically operated and will not be affected by the reallocation aspect of this final rule.

VI. Regulatory notices and analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 4 §§ 2531-2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandate Reform Act of 1995 (Public Law 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal

governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

In conducting these analyses, FAA has determined this final rule (1) has benefits that justify its costs, and is a "significant regulatory action" as defined in Executive Order 12866 both because it is economically significant and because it raises the type of novel policy issues contemplated under that executive order. Accordingly, OMB has reviewed this final rule. The rule is also "significant" as defined in DOT's Regulatory Policies and Procedures. The final rule will not have a significant economic impact on a substantial number of small entities and will not adversely affect international trade or impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

The FAA received numerous comments regarding its regulatory analysis of this rulemaking action. These comments are addressed in the Final Regulatory Evaluation and readers are directed to that document to see how they are addressed.

Among the concerns raised by commenters was that the analysis of the SNPRM did not satisfy Executive Order 12866. Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The FAA complied with this order by making its determination in the SNPRM regulatory evaluation based upon the quantified benefits exceeding the quantified costs. In addition we have taken into account public comments in our final evaluation and have updated our cost and benefits estimates.

Total costs and benefits of this rulemaking

We evaluate the costs and benefits of this rule using two baselines. One baseline assumes no operating constraints at the airport; this is the same baseline as the NPRM

and SNPRM. The second baseline preferred by some commenters assumes the current operating limits at the airport continue into the foreseeable future. When we evaluate this final rule using the same baseline as in the SNPRM, the net total benefits are $3.2 billion. When we use the alternative baseline, the total estimated net benefits are $1.3 billion.

The net present value benefits of the auction are $65.4 million. As the sale of a slot is a transfer (no change to gross national product), we assign no costs those purchasing a slot. While the total present value auction costs are $24 million, the slot reallocation benefits that offset these costs are $89.3 million.

Who is potentially affected by this rulemaking

- Operators of scheduled and non-scheduled flights to LaGuardia and new entrants who do not yet operate at LaGuardia.
- All communities, with air service to LaGuardia (including small communities).
- Passengers of scheduled flights to LaGuardia.
- The Port Authority of New York and New Jersey, which operates the airport.
- Passengers on scheduled and unscheduled flights transiting New York airspace.

Base case

- Base Case 1: No operating authorizations or caps (the rule will generate $3.2 billion in net benefits, of which $65.4 million is attributable to reallocation benefits associated with auctions and the balance to the cap on operations).
- Base Case 2: Indefinite extension of the current LaGuardia Order (the rule will generate $1.3 billion in net benefits, of which $65.4 million are attributable to reallocation benefits associated with auctions and the balance to the cap on operations).

Assumptions

- Discount Rate – seven percent
- Assumes 2008 Constant Year Dollars
- Passenger Value of Travel Time -- $30.86 per hour[35]

[35] GRA, Incorporated "Economic Values for FAA Investment and Regulatory Decisions, A Guide" prepared for the FAA Office of Aviation Policy and Plans (October 3, 2007). Value is weighted using LaGuardia shares of 51 percent leisure and 49 percent business travel.

- 85 percent of current slots will be "grandfathered" to carriers who hold the corresponding Operating Authorization under the LaGuardia Order pursuant to a cooperative lease agreement for a period of ten years.

Alternatives we have considered

- No caps (no action): Based on past history, the FAA expects operators would expand operations and further worsen airport delay.
- 2006 NPRM: The 2006 NPRM would have instituted caps, provided for mandatory upgauging, and withdrawn 10 percent of slots annually for reallocation. We have amended the SNPRM proposal in favor of the one finalized here.
- Caps with no reallocation: This alternative would permanently impose caps at 75 scheduled operations and three unscheduled operations per hour. It would grandfather all current Operating Authorizations, assigning them to carriers currently operating at the airport. This alternative would stifle actual and potential competition.

Benefits of this rulemaking

The primary benefits of this rulemaking will be due to the delay reduction from the reduction in the cap on operations and an improvement in the allocation of scarce slot resources through the use of an auction mechanism.

Since publishing the NPRM and the SNPRM, we have updated our cost and benefit estimates. A detailed discussion of on the applied methodology as related to consumer and producer surplus can be found in the NPRM regulatory evaluation. The total net benefits of this final rule are summarized in the following table. The baseline costs and benefits from setting the cap of 75 scheduled operations and 6 unscheduled operations, plus reducing the cap, and the net benefits from the auction result in net benefits of $3.2 billion. The net benefits from reducing the cap and from the auction are $1.2 billion based on the current capped operation level. This is the alternative baseline suggested by commenters.

Net Benefits of the Rule ($2008 mil)	
Net Benefit of a Cap: 75 scheduled; 6 Unscheduled	$1,862.5
Net Benefit of Reducing Cap: 71 scheduled; 3 unscheduled	$1226.7
Net Benefit of the Auction	$65.4
TOTAL NET BENEFITS of CAP, CAP Reduction and Auction	$3,154.6
TOTAL NET BENEFITS of CAP Reduction and Auction	$1,292.1

Costs of this rulemaking

Since the SNPRM, and at the request of commenters, we have re-estimated the costs associated with this rule. These costs include the costs to the public and private sectors of designing, implementing and participating in the auction. The total present value costs are $23.9 million. As the costs of purchasing a slot are a transfer from one entity to another, these costs are not included. However, we include a discussion of slot values in the Final Regulatory Evaluation. We estimate $6.2 million as the nominal auction costs to the FAA. The nominal cost for carriers is $21.7 million.

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted the information requirements associated with this proposal to the Office of Management and Budget for its review.

ATA believes the FAA's estimate of the paperwork burden is understated. ATA noted that there will also be significant legal fees associated with negotiating, drafting,

executing and monitoring the secondary market. Based on this, ATA believes the estimated burden should be between 50 percent to 100 percent of a full-time management employee's time.

FAA does not agree with ATA's assessment of the time necessary to participate in the secondary market. The secondary market being adopted in this final rule does not vary much in scope from the secondary market in place at the airport over the past several years. We do, however, acknowledge that participation in the government auction will require airlines to dedicate employee time and resources in order to prepare and submit their bids. It should be noted, however, that participation in the auction and secondary market are not requirements of this rule. A carrier with existing slots at LaGuardia is permitted to continue operations at the airport using the common slots grandfathered to them as part of this final rule. Carriers will only need to engage in the secondary market and auction if they choose to buy, lease or sell slots.

Some of the information requirements in today's rule are similar to those originally proposed in the 2006 notice. The FAA has updated these requirements and summarized them below.

Title: Congestion Management Rule for LaGuardia Airport

Summary: The rule grandfathers the majority of operations at the airport and will develop a robust secondary market by annually auctioning off a limited number of slots; the FAA plans to use the proceeds from the auctions to mitigate congestion and delay in the New York City area. In addition, the hourly cap on scheduled operations will be reduced to 71 per hour during the regulated hours except. This reduction will lead to an estimated 41 percent reduction in modeled delay at the airport. This rule also contains provisions for

use-or-lose, unscheduled operations, and withdrawal for operational need. The rule will sunset in ten years.

More information on the proposed requirements is detailed elsewhere in today's notice.

Use of: The information is reported to the FAA by scheduled operators holding slots. The FAA logs, verifies, and processes the requests made by the operators.

This information is used to allocate, track usage, withdraw, and confirm transfers of slots among the operators and facilitates the buying and selling of slots in the secondary market. The FAA also uses this information in order to maintain an accurate accounting of operations to ensure compliance with the operations permitted under the rule and those actually conducted at the airport.

Respondents: The respondents to the proposed information requirements in today's notice are scheduled carriers with existing service at LaGuardia, carriers that plan to enter the LaGuardia market (by auction or secondary market), and carriers that enter the LaGuardia market in the future. There are currently fourteen (14) carriers with existing scheduled service at LaGuardia.

Frequency: The information collection requirements of the rule involve scheduled carriers notifying the FAA of their use of slots. The carriers must notify the FAA of: (1) its designation of 50 percent of its Limited Slots; (2) request for confirmation to sublease slots; (3) its consent to transfer slots under the transferring Carrier's marketing control; (4) requests for confirmation of one-for-one slot trades; (5) slot usage (operations); (6) request for assignment of slots available on a temporary basis; and (7) participation in FAA auctions.

Annual Burden Estimate: The annual reporting burden for each subsection of the rule is presented below. Annual burden estimates presented in today's notice are based on burden estimates from the 2006 notice.

The burden is calculated by the following formula:

Annual Hourly Burden = (# of respondents) * (time involved) * (frequency of the response).

§ 93.64(c)(3) Categories of Slots: 50 percent designation of Limited Slots

(6 carriers) * (80 hours per submittal) = 480 hours

Based on the current allocation of Operating Authorizations and the level of baseline operations each carrier would be grandfathered under today's rule, we assumed the 6 carriers with the most operations at LaGuardia would expend up to ten days of planning time each, potentially 80 hours, to develop and submit its designation of 50 percent of its Limited Slots. This designation would occur once, ten days after the final rule effective date.

Sections 93.65(c)-(d) and 93.66(a) Initial Assignment of Slots and Assignment of New or Returned Slots

We assumed 50 carriers will expend time submitting and collecting information to participate in the proposed auctions for slot assignments. For the overall auction activity, a carrier would likely assemble a multidisciplinary team of existing staff that would consist of an auction manager, an operations research specialist, and a corporate lawyer. The assembled team involved in the auction would not be dedicated entirely to the auction process and could continue to work on existing projects and responsibilities. The information collection is 32 hours per carrier and is a subset of the overall carrier auction

costs. It consists of submitting an expression of interest (8 hours) and submitting bids (24 hours).

We estimate the annual auctions would require approximately 32 hours for the assembled team of resources to submit the Auction Expression of Interest and submit the bid file to FAA auction system. Both of these paperwork submission requirements will be filed electronically.

(50 bidding carriers) * (32 hours per carrier) * (1 occurrence per year) = 1,600 hours

Section 93.68 (b)-(f) Sublease and Transfer of Slots

(14 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia would expend one and one half hours for each occurrence of a lease or transfer of a slot. For each operator, we assumed that a lease or transfer of a slot would occur on average quarterly.

Section 93.69(b) One-for-One Trades of Operating Authorizations

(14 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 marketing carriers operating at LaGuardia expend one and one half hours for each occurrence of a one-for-one trade of a slot. For each operator, we assumed that a one-for-one trade of a slot would occur quarterly.

Section 93.72(a) Reporting Requirements

(14 carriers) * (1.5 hours per submittal) * (6 occurrences per year) = 126 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia expend one and one half hours every two months of the data required by § 93.72(a).

Section 93.73(d)-(e) Administrative Provisions

(14 carriers) * (1.5 hours per submittal) * (4 occurrence per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia expend one and one half hours every quarter for administrative provisions.

Summary

Total First Year Hourly Reporting Burden —2,458 Hours

Total Recurring Annual Hourly Reporting Burden (years 2-5) — 1,978 Hours

Total Recurring Annual Hourly Reporting Burden (after fifth year) — 378 Hours

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. OMB has assigned control number 2120-0719 to this information collection.

Regulatory flexibility determination

The Regulatory Flexibility Act of 1980 (Public Law 96-3540 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and

consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. If the agency determines that it would, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule will not have a significant impact on a substantial number of entities as there is only one small entity that might be affected. Although there are three scheduled operators whose employee total is less than 1,500 (the SBA criterion for small entity airline), all three of these operators are subsidiaries of larger companies with employees exceeding 1,500. In January, 2007 there was one destination, Nantucket Memorial Airport, whose surrounding community was substantially less than the SBA criterion of 50,000 for communities. When we checked Official Airline Guide for July, 2008 we found one additional destination, Martha's Vineyard, with seasonal service having a surrounding-community population less than 50,000. We conclude that there is only one community with year-around service that qualifies as a small entity and no airline operator is a small entity.

Since the comments to the SNPRM referenced small communities, operators, and small equipment, we will now discuss those comments within the context of the requirements of the Regulatory Flexibility Act. We have already provided more general responses to the comments earlier in this document.

The FAA received one comment claiming that the FAA failed to adequately consider alternatives in violation of the Regulatory Flexibility Act. This commenter was not a small entity. Because the agency has determined that the rule will not have a significant economic impact on a substantial number of small entities, no further analysis as required under the Act. However, as discussed earlier, the agency has considered multiple alternatives in developing this rule.

Several commenters noted that service to small communities is provided using smaller aircraft. The Port Authority estimated with auctions, the cost per seat for carriers could be from two to six times higher for small aircraft. The Regional Airline Association (RAA) commented many communities are served exclusively by small regional aircraft and that it is only through these smaller planes that there can be any meaningful competition in smaller communities. US Airways also remarked the SNPRM will be a form of a 'forced upgauging' on LaGuardia and that to the extent the other New York area airports use auctions, it will preclude nonstop service from many smaller communities.

Finally, NetJets commented limiting unscheduled operations will also negatively impact small communities. According to NetJets, many of the smallest markets have no commercial air service to the New York City area and general aviation is the only air link to the region.

This final rule helps ensure service to small communities as we dropped the requirement for aircraft upgauging at LaGuardia and we reduced the number of slots for reallocation from 100 percent of slots in ten years to ten percent of slots in five years. A majority of slots at the airport will be grandfathered to current slot-holders for the duration of the rule. The reduction of slots to be reallocated, and the withdrawal of upgauging will help ensure service to small community airports. This rule is not designed to force carriers to serve particular communities. Ultimately this rule allows the market to allocate scarce resources. Just as is the case today, the rule allows an operator to make a business decision to retain, add, or remove service to a small community. In the case a small community loses service, they can apply for Essential Air Service from the Department of Transportation to restore service. Currently neither the airport at Marthas Vineyard with its seasonal service nor Nantucket Memorial Airport receives Essential Air Service.

The changes contained in this final rule also help operators flying smaller equipment. With only ten percent of the slots subject to reallocation, the initial impact on all operators is substantially reduced. Although there will be no rule requirement regarding the size of airplane, the operator might decide to fly a larger, or smaller airplane. This decision belongs to the operator. With a reduced number of slots to be reallocated and the removal of upgauging, the impact on all operators and especially those flying smaller equipment has been reduced.

Lastly most of NetJet's comments are directed toward the nonscheduled service requirement. After reviewing LaGuardia nonscheduled service, nearly all service can be accommodated at preferred times under the final rule. For those few cases where the

preferred hour is not possible, almost all service can be accommodated in the adjacent hours. Lastly, in the rare case where the adjacent hour will not accommodate the overflow, a 2 to 3 hour window should permit the operation. The rule does allow all operators, including NetJet the opportunity to buy a slot to ensure operations to New York. Such an opportunity is very difficult in today's environment.

In summary, the FAA has mitigated the impact on all operators, especially those flying smaller equipment, and there is only one small entity who would potentially be affected by this rule. Nantucket Memorial receives year-around service and the surrounding community is less than 50,000. However, as one small-entity is not a substantial number, as the acting FAA Administrator, I certify this final rule will not have a significant economic impact on a substantial number of small entities.

International trade impact assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would impose no costs on international entities and thus have a no trade impact. Canadian entities are the only foreign operators at LaGuardia and their slots are protected by a bilateral aviation agreement and not affected by the rule. They might benefit from the rule if they choose to participate in the proposed auction to acquire additional slots.

Unfunded mandate assessment

The Unfunded Mandate Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $136.1 million in lieu of $100 million. This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

Environmental analysis

FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" identifies FAA actions that are normally categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances The FAA has determined that this rulemaking qualifies for the categorical exclusions

identified in paragraph 312d “Issuance of regulatory documents (e.g., Notices of Proposed Rulemaking and issuance of Final Rules) covering administration or procedural requirements (does not include Air Traffic procedures; specific Air traffic procedures that are categorically excluded are identified under paragraph 311 of this Order)” and paragraph 312f, “Regulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment.” It has further been determined that no extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required. The FAA has documented this categorical exclusion determination. A copy of the determination and underlying documents has been included in the Docket for this rulemaking.

The Port Authority estimates that there would be a five to fifteen percent increase in night operations as a result of the proposed auction alternatives in the SNPRM. A resident of a neighborhood near LaGuardia said that there are already many flights until midnight and that flights in these later hours adversely affect the quality of life of neighbors. The FAA does not believe there is a reasonable projection that the final rule will result in additional nighttime operations for the following reasons. First, there are currently 14 unused slots in the 8:00 p.m. and 9:00 p.m. hours that could be used for scheduled operations; we therefore believe it is unlikely that the number of nighttime operations will increase to a point where the currently unallocated slots are filled and additional operations are added in the later evening hours. Second, there are a limited number of remote overnight parking positions at the airport, which physically bounds the number of nighttime operations that can be accommodated at LaGuardia.

Regulations that significantly affect energy supply, distribution, or use

The FAA has analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because while a "significant regulatory action" under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Additional information

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (http://www.regulations.gov);

2. Visiting the FAA's Regulations and Policies web page at http://www.faa.gov/regulations_policies/; or

3. Accessing the Government Printing Office's web page at http://www.gpoaccess.gov/fr/index.html.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue S.W, Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

You may access all documents the FAA considered in developing this rule, including economic analyses and technical reports, from the internet through the Federal eRulemaking Portal referenced in paragraph (1).

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (air).

VIII. Regulatory Text

In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations, as follows:

PART 93—SPECIAL AIR TRAFFIC RULES

1. The authority citation for part 93 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44701, 44719, 46301.

2. Subpart C is added to read as follows:

Subpart C – LaGuardia Airport Traffic Rules

Sec.

Subpart C—LaGuardia Airport Traffic Rules

§ 93.35 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at LaGuardia Airport (LaGuardia).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at LaGuardia.

(c) The provisions of this subpart apply to LaGuardia during the hours of 6:00 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday. No person shall operate any scheduled arrival or departure into or out of LaGuardia during such hours without first obtaining a slot in accordance with this subpart. No person shall conduct an unscheduled operation to or from LaGuardia during such hours without first obtaining a reservation.

(d) Carriers that have common ownership shall be considered a single air carrier for purposes of this rule.

(e) The slots assigned under this subpart terminate at 10:00 p.m. on March 9, 2019.

§ 93.36 Definitions.

For purposes of this subpart, the following definitions apply:

Airport Reservation Office (ARO) is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for the administration of reservations for unscheduled operations at LaGuardia.

Base of operations are those common slots held by a carrier at LaGuardia on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION], that do not exceed 20 operations per day and all slots guaranteed under The Air Transport Agreement between the Government of the United States of America and the Government of Canada.

Carrier is a U.S. or foreign air carrier with authority to conduct scheduled service under Parts 121, 129, or 135 of this chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapters 411 and 413.

Common ownership with respect to two or more carriers means having in common at least 50 percent beneficial ownership or control by the same entity or entities.

Common slot is a slot that is allocated by the FAA as a lease under its cooperative agreement authority for the length of this rule.

Enhanced computer voice reservation system (e-CVRS) is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at LaGuardia and other designated airports.

Limited slot is a slot, the lease for which expires prior to the expiration of this rule for retirement or subsequent allocation by the FAA as an unrestricted slot.

Public charter is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

Public charter operator is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

Reservation is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day during a specific 60-minute period.

Scheduled operation is the arrival or departure segment of any operation regularly conducted by a carrier between LaGuardia and another point regularly served by that carrier.

Slot is the operational authority assigned by the FAA to a carrier to conduct one scheduled operation or a series of scheduled operations at LaGuardia on a particular day(s) of the week during a specific 30-minute period.

Unrestricted slot is a slot that is allocated to a carrier by the FAA via the auction of a lease.

Unscheduled operation is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft, excluding helicopters, between LaGuardia and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this rule: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

§ 93.37 Slots for scheduled arrivals and departures.

(a) During the hours of 6:00 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday, no person shall operate any scheduled arrival or departure into or out of LaGuardia without first obtaining a slot in accordance with this subpart.

(b) (1) Prior to March 8, 2009, the number of slots shall be limited to no more than seventy-five (75) per hour unless otherwise provided by the Administrator. The number of slots may not exceed 38 in any 30-minute period, and 75 in any 60-minute period.

(2) Effective March 8, 2009, and except as otherwise established by the FAA under paragraph (c) of this section, the number of slots available from 6:00 a.m. through 9:59 p.m. shall be limited to no more than seventy-one (71) per hour. The number of slots may not exceed 38 in any 30-minute period, and 71 in any 60-minute period. The

number of arrival and departure slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of slots based on a review of the following:

(1) The number of delays;

(2) The length of delays;

(3) On-time arrivals and departures;

(4) The number of actual operations;

(5) Runway utilization and capacity plans; and

(6) Other factors relating to the efficient management of the National Airspace System.

§ 93.38 Categories of slots.

Each slot shall be designated as a common slot, limited slot or unrestricted slot and shall be assigned to the carrier under a lease agreement. A lease for a common or limited slot shall be assigned via a cooperative agreement. A lease for an unrestricted slot shall be awarded via an auction.

(a) Common slots.

(1) All slots within any carrier's base of operations as determined on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION] shall be designated as common slots.

(2) 176 slots at LaGuardia on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION] shall be designated as limited slots or unrestricted slots. All other slots shall be designated as common slots.

(b) Limited slots. Those slots assigned to a carrier subject to return to the FAA under § 93.39(c) and (d) shall be designated as limited slots until the date of their reassignment by the FAA as unrestricted slots or their retirement by the FAA. A carrier may continue to use a limited slot that has reverted to the FAA until the second Sunday in the following March.

(1) Each carrier with a total number of daily operations at LaGuardia in excess of its base of operations, will be notified by no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION] how many of its slots will be designated as limited slots pursuant to paragraphs (b)(3) and (4) of this section.

(2) A carrier shall designate 50 percent of its limited slots. The carrier must notify the FAA of its designation by [INSERT DATE 70 DAYS AFTER DATE OF PUBLICATION].

(3) The FAA will designate the remaining limited slots, initially excluding those hours in which five or more slots have been designated as limited slots by the carriers.

(4) No later than [INSERT DATE 80 DAYS AFTER DATE OF PUBLICATION], the FAA will publish a list of all limited slots and the dates upon which they will expire.

(c) Unrestricted slots. Unrestricted slots are slots acquired by a carrier through a lease with the FAA awarded via an auction. Unrestricted slots are not subject to withdrawal by the FAA.

§ 93.39 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section, any carrier allocated operating rights under the Order, Operating Limitations at New York LaGuardia Airport, during the week of September 28 – October 4, 2008, as evidenced by the FAA's records, will be assigned corresponding slots in 30-minute periods consistent with the limits under § 93.37 (b). If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned slots within the same hour to meet the 30-minute limits under § 93.37(b). The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

(b) If a carrier was allocated operating rights under the Order Limiting Operations at LaGuardia Airport during the week of September 28- October 4, 2008, but the operating rights were held by another carrier regularly conducting operations at the airport as of that week, then the corresponding slots will be assigned to the carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) (1) In accordance with the schedule published under §93.38(b)(4),

(i) Twenty-four (24) limited slots shall revert to the FAA on [INSERT DATE 95 DAYS AFTER DATE OF PUBLICATION] and be auctioned as unrestricted slots by the FAA.

(ii) Every year thereafter, twenty-two (22) limited slots shall revert to the FAA and be auctioned as unrestricted slots by the FAA.

(2) Any slot receiving no responsive bids will be retired until the next auction.

(3) An affected carrier will be allowed to use the limited slot until the following second Sunday in March.

(d) On March 8, 2009, the FAA will retire 64 of the limited slots returned to the FAA under § 93.38(b).

§ 93.40 Assignment of new or returned slots.

(a) New capacity or capacity returned to the FAA pursuant to the provisions of § 93.44 will be reassigned by the FAA via an auction. Slots acquired from the FAA under the auction proceeding shall be designated as unrestricted slots.

(b) The FAA may decide to accumulate a quantity of slots prior to conducting an auction.

§ 93.41 Reversion and withdrawal of slots.

(a) This section does not apply to unrestricted slots.

(b) A carrier's common slots or limited slots revert back to the FAA 30 days after the Carrier has ceased all operations at LaGuardia for any reasons other than a strike.

(c) The FAA may retime, withdraw or temporarily suspend common slots and limited slots at any time to fulfill operational needs.

(d) Common slots and limited slots temporarily withdrawn for operational need will be withdrawn in accordance with the priority list established under § 93.47.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected carrier before withdrawing or temporarily suspending a common slot or

limited slot and specify the date by which operations under the common slot or limited slot must cease. The FAA will provide at least 45 days notice unless otherwise required by operational needs.

(f) Any common slot or limited slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the carrier from which it was withdrawn, provided the carrier continues to conduct scheduled operations at LaGuardia.

(g) Should the Administrator determine that the cap on scheduled operations at LaGuardia is too high, he may withdraw common slots to reduce the cap. Any such action by the Administrator shall be subject to the notice and comment provisions of the Administrative Procedure Act.

§ 93.42 Sublease and transfer of slots.

(a) A carrier may sublease its slots to another carrier in accordance with this section and subject to the provisions of the carrier's lease agreement with the FAA. The character of the slot (e.g., common slot) will not change.

(b) A carrier must provide notice to the FAA to sublease a slot. Such notice must contain: the slot number and time, effective dates and, if appropriate, the duration of the lease. The carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the slot and relevant details on the FAA Web site at http://www.faa.gov. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each carrier's consent to sublease must be provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

(1) The names of all bidders and all parties to the transaction;

(2) The offered and final length of the sublease;

(3) The consideration offered by all bidders and provided by the sublessee.

(e) The slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) A carrier may transfer a slot to another carrier that conducts operations at LaGuardia solely under the transferring carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer, and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction. However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services is the final decision maker for any determinations under this section.

(g) A carrier wishing to sublease a slot via an FAA auction under § 93.39(c), rather than pursuant to this section may do so. The carrier shall retain the proceeds and the slot shall retain the same designation that it had prior to the carrier placing it up for auction.

§ 93.43 One-for-one trade of slots.

(a) A carrier may trade a slot with another carrier on a one-for-one basis.

(b) Written evidence of each carrier's consent to the trade must be provided to the FAA.

(c) No recipient of the trade may use the acquired slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

§ 93.44 Minimum Usage Requirements

(a) This section does not apply to unrestricted slots.

(b) Any common slot or limited slot that is not used at least 80 percent of the time over a consecutive two-month period shall be withdrawn by the FAA.

(c) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the carrier and which affects carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(d) The FAA will treat as used any common slot or limited slot held by a carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

§ 93.45 Unscheduled operations.

(a) During the hours of 6:00 a.m. through 9:59 p.m., Monday through Friday, and 12 noon through 9:59 p.m. on Sunday, no person may operate an aircraft other than a helicopter to or from LaGuardia unless he or she has received, for that unscheduled operation, a reservation that is assigned by the Airport Reservation Office (ARO) or in the case of public charters, in accordance with the procedures in paragraph (d) of this section. Requests for reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from LaGuardia. Additional

information on procedures for obtaining a reservation is available on the Internet at http://www.fly.faa.gov/ecvrs.

(b) Three reservations are available per hour, including those assigned to public charter operations under paragraph (d) of this section. The ARO will assign reservations on a 60-minute basis.

(c) The ARO will receive and process all reservation requests for unscheduled arrivals and departures at LaGuardia. Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One reservation per hour will be available for allocation to public charter operations prior to the 72-hour Reservation window in paragraph (a) of this section.

(1) The public charter operator may request a reservation up to six months in advance of the date of flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW, Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to 7-awa-slotadmin@faa.gov.

(2) The public charter operator must certify that its prospectus has been accepted by the Department of Transportation in accordance with 14 CFR part 380.

(3) The public charter operator must identify the call sign/flight number or aircraft registration number of the direct air carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after LaGuardia, and aircraft type. Any changes to an approved reservation must be approved in advance by the Slot Administration Office.

(4) If reservations under paragraph (d)(1) of this section have already been allocated, the public charter operator may request a reservation under paragraph (a) of this section.

(e) The filing of a request for a reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the reservation is obtained, must include the reservation number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to reservations. Non-emergency flights in direct support of national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver are available on the Internet at http://www.fly.faa.gov/ecvrs.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional reservations may be accommodated for a specific time period. Unused slots may also be made available temporarily for unscheduled operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

§ 93.46 Reporting requirements.

(a) Within 14 days after the last day of the two-month period beginning January 1, 2009 and every two months thereafter, each carrier must report, in a format acceptable to the FAA, the following information for each slot:

(1) The slot number, time, and arrival or departure designation;

(2) The operating carrier;

(3) The date and scheduled time of each of the operations conducted pursuant to the slot, including the flight number and origin/destination;

(4) The aircraft type identifier.

(b) The FAA may withdraw the common slot or limited slot of any carrier that does not meet the reporting requirements of paragraph (a) of this section.

§ 93.47 Administrative provisions.

(a) Each slot shall be assigned a number for administrative convenience.

(b) The FAA will assign priority numbers by random lottery for common slots and limited slots at LaGuardia. Each common slot and limited slot will be assigned a withdrawal priority number, and the 30-minute time period for the common slot or limited slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number common slot or limited slot will be the last withdrawn.

(d) Any slot available on a temporary basis may be assigned by the FAA to a carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining slots may be made available for unscheduled operations on a

non-permanent basis and will be assigned under the same procedures applicable to other operating reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

Issued in Washington, DC, on October 6, 2008.

Robert A. Sturgell
Acting Administrator

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